Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

EDWARD SIGUEL,
Petitioner pro se

v.

ALLSTATE LIFE INSURANCE CO.,
Respondent

Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit
and Appendices

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Date: Aug 31, 1995 *Petitioner, Pro Se*

QUESTIONS PRESENTED

The questions pertain to the constitutional and statutory rights of *pro se* parties to be assisted by counsel; the conflicts among circuits in the interpretation of Federal Rules of Civil Procedure (**FRCP**) and Evidence concerning request for admissions, "excusable neglect" and "prejudice"; the burden of proof and the admissibility of evidence in a tort as opposed to a contract claim; whether parties to an insurance contract may agree to the nature of proof or whether they must prove their claims under a court-imposed tort standard; and the meaning of "accidental death". Review is needed to provide uniform interpretation of federal law in light of Supreme Court rulings on these topics, to close loopholes, and enforce the FRCP.

1. Denial of assistance of counsel to pro se plaintiff.

(a) Even if there is no explicit statutory right, may a Judge in District Court (**USDC**) create a non-discretionary rule that drastically discriminates between *pro se* and other parties, denies the assistance of counsel, and prevents *pro se* parties from effectively presenting their case?

(b) Did the USDC violate plaintiff's constitutional right to due process and statutory right to access to the Courts; violate the First Amendment, and abuse its discretion in creating a Judge's own non-discretionary local rule by ruling that ***"I never permit a combination of a lawyer and pro se"***, thereby denying (for no reason whatsoever) *pro se* plaintiff's request to have a lawyer to assist him?

2. Accidental death claim.

(a) In a claim under an accidental death insurance policy that *paid for any accidental death anywhere* unless specifically excluded, is there a difference in the nature of proof required to prove (i) any accidental death due to *any cause anywhere*, (ii) an accidental death caused by *an accidental event*, and (iii) an accidental death caused by some accidental event that *happened in public transportation*? Can parties to an insurance contract agree to the proof of loss (nature of proof) or may the Court impose

a tort-like requirement for expert testimony?

(b) Is "**cardiorespiratory arrest**" (**CRA**) an event or occurrence or injury that could fulfill the definition of accident under an insurance contract and be the cause of death? May death due to unknown iatrogenic causes be "accidental"? Did the USDC err in compelling the plaintiff-beneficiary to identify an accidental event other than the event "**CRA**" or, alternatively, err in requiring plaintiff-beneficiary to identify injuries other than the injury **CRA,** even though that ruling was tantamount to imposing a "means test" illegal under the insurance laws of the relevant jurisdictions? (in light of Justice Cardozo's opinion in *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 54 S.Ct. 461, 78 L.Ed. 934 (1934)).

(c) May a Judge modify the terms of an insurance contract and mandate a tort-like requirement for proof of breach of contract that requires scientific expert testimony when the need for such proof was contrary to the expectations of the parties at the time the contract was made, and when the requirement substantially increase costs? (in light of *American Airlines v. Wolens*, No. 93-1286, 1995, 63 U.S. Law Week 4069, 4070).

(d) Did the USDC improperly apply the Federal Rules of Evidence (**FRE**) when it denied probative value to the uncontradicted statements of an attending physician regarding the cause of death (because it did not include a scientific explanation), instead of allowing such statement into evidence and letting the content and degree of specificity of the statement go to the weight rather than its admissibility when the physician wrote these statements in the ordinary course of completing the proof of loss form required by the insurer?

(e) When the insurance contract does not require expert testimony for proof of loss prior to payment, may the insurer deny payment of accidental injury claims without notifying the claimant that expert testimony is needed? May the insurer or the Court require expert testimony *at trial* when such expert testimony is less probative without an autopsy, or because facts and witnesses (such as a deceased attending physician) are no longer available)?

3 Withdrawal of admissions deemed admitted.

(a) Must parties respond to request for admissions within the time limits of Federal Rule of Civil Procedure (**FRCP**) 36 or may they intentionally violate them, respond late, and withdraw admitted admissions even when such withdrawal substantially increases the costs and length of litigation to the opposite party? Does "***prejudice***", as used in the FRCP, include *frustrated* discovery, delays, increased costs, and the need to prove facts admitted but later denied by defendant 105 days later (or does it refer only to the "***sudden***" need to find evidence?)

(b) May a Judge find "excusable neglect" in the knowing and intentional failure to comply with the time limits imposed by FRCP and thus make it more beneficial to violate rather than comply with the FRCP, in light of *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 113 S.Ct. 1489 (1993) and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 895 (1989)?

(c) May a **USDC** create a broad class of exceptions that extends the time in which a party may respond to requests for admissions by more than 100 days, and thereby destroy the distinction between pre- and *post*-deadline events drawn in *Lujan v. National Wildlife Federation, supra*?

(d) May a Judge allow a party to fulfill its obligation to respond to requests for admissions by indicating its probable response without actually responding on time, and later allow said party to withdraw admissions admitted due to lack of an official response, and serve "official answers" because the opposite party was presumably aware of the likely answers and thus it may not have been prejudiced with a "**sudden**" need to find evidence?

(e) Did the USDC fail to enforce the distinction between pre and *post*-deadline behavior when it refused to impose costs for failure to comply with the FRCP, which failure caused delays, increased costs, permanently frustrated discovery, but the Court nevertheless held that such failure did not constitute prejudice to an individual plaintiff with small resources, even when such actions cripple a plaintiff's ability to pay for further discovery?

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Edward Siguel, *pro se*, petitions for a Writ of Certiorari to review the decision rendered in the US Court of Appeals for the First Circuit on April 5, 1995.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit, dated March 10, 1995, affirming the District Court's decision of judgment for the defendant (Appendix A). A petition for rehearing, was denied April 5, 1995 (Appendix H). The US District Court's (**USDC**) final judgment for the defendant is in Appendix G. See Appendices B-I for copies of intermediate opinions.

JURISDICTION

The case was filed based on diversity of citizenship (28 USC § 1332) between the plaintiff (in Massachusetts), and **Allstate** with principal offices in Illinois. Appeal to the Court of Appeals is from a final judgment, 3/9/94, that disposes of the case (28 USC §1291). The appeal was filed in the 1st Circ. 4/6/94 which upheld the lower court. A petition for rehearing was denied on April 5, 1995 (Appendix at A-I).

Constitutional Provisions

Article V. Due process. ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law".

First Amendment. "Congress shall make no law . . . abridging the freedom of speech, . . .; or the right of the people . . . to petition the Government for a redress of grievances."

14th Amendment. Due Process. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law, . . ."

Statutes and Regulations

The statutes are similar in Illinois and Massachusetts, the two jurisdictions applicable to this case.

Massachusetts

MGL = Mass General Laws.
CMR = Code of Mass. Regulations.

M.G.L.c. 176D § 3(9), Unfair methods of competition and unfair or deceptive acts or practices.
"9)(e), failing to affirm or deny coverage of the claim within a reasonable time after proof of loss statements were provided".
"(9)(n), failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim."

211 CMR 42.06(4). "Accident, Accidental injury, Accidental Means, shall be defined to employ "result" language and shall not include words which establish an accidental means test or use words such as "external, violent, visible wounds" or similar words of description of characterization . . ."

Illinois
IAC = Illinois Administrative Code
50 IAC § 919.50(b) which states:
". . . if the claim is denied, the company shall provide to the insured a reasonable written explanation of the basis of the lower offer or denial within 30 days after the investigation and determination of liability is completed. The written explanation to the insured shall clearly set forth the policy definition, limitation, exclusion or condition upon which denial was based and notice of availability of the Department of Insurance shall accompany this explanation."

Illinois code 73 ¶ 836 (ins. code §224). **Standard provisions for life policies**. "(j). A provision that when a policy is a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and not later than 2 months after the receipt of such proof."

50 IAC ¶ 919.50, 919.50(a)(1) explanation of denial must "clearly set forth the policy definition, limitation, exclusion or condition upon which denial was based." 50 IAC § 2007.50, § 2001.20(h) and § 2001.20(h)(2): "Terms such as 'external' and 'violent' in connection with the definition of accident . .. are not acceptable."

Court Rules

FRCP 6(b). **Time, Enlargement.** ". . . the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . ."

FRCP 29(2). **Stipulations regarding discovery procedure.** "Unless the court orders otherwise, the parties may by written stipulation . . . (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court."

FRCP 36. **Requests for Admission.** (a) "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or to the application of law to fact including the genuineness of any documents described in the request" "The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection address to the matter. . . ".

(b) ". . . the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."

STATEMENT OF THE CASE [1] [2]

This action was brought to recover damages resulting from the breach of an accidental death insurance contract ("**policy**") on the life of I. Siguel, and from violation of consumer protection insurance laws. The **policy** or "**contract**" pays $200,000 for an accidental death caused by an accident in a bus, and $60,000 for "***any accidental death anywhere***" (if not explicitly excluded), including death due to **cardiorespiratory arrest (CRA)**.

This action was filed in 1991 by plaintiff Berta Siguel, wife of the deceased. In 1992, the District Court (**USDC**) granted Allstate's motion to disqualify her attorney-son Siguel ***before trial*** due to his potential role as a witness. Because of the costs involved in finding substitute counsel, Berta Siguel assigned the case to her son, who became the substituted plaintiff and who proceeded *pro se*. The Judge then held that a *pro se* plaintiff (as a matter of policy or non-discretionary rule) was not entitled to the assistance of counsel, and denied Siguel's motion to be assisted by counsel. The trial Judge stated his rule: ***"I never permit a combination of a lawyer and pro se party."***

The insured-deceased injured his arm while traveling in a bus and developed an abscess. While the abscess was treated at a hospital in Argentina, he suffered an unexpected event, **cardiovascular arrest (CRA)**, causing injury to the heart and lungs. While CRA is not always the cause of death, CRA was the cause of legal death in this case. This claim was filed with Allstate in June, 1988. On 12/27/89 Allstate denied liability because "the cause of death . . . is Cardio-Respiratory Arrest". After the claim was

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[1] **Note**. Space limitations make it impossible to cite all material facts, existing precedent, all appropriate arguments and to include copies of all relevant documents. Documents are available from the Appeals Court.

[2] A table of events and delays is attached as an Appendix to this brief as an aid to the Court. To aid comparison with other documents filed in the Appeals Court (but not included with this writ), references to pages **Tr I-x** are trial pages, **Day I, page x**. Pages **Ax** refer to the **Appendix page "x"**. **Exhibits** admitted into evidence for any purpose at Trial are abbreviated as **Tr Exh #**. **Docket #** is abbreviated **Dk #**.

rejected, Siguel asked Allstate what additional evidence was needed to prove the claim. Allstate refused to respond.

During 1988 Siguel provided all the documents requested by Allstate to meet the proof of loss requirement stated in the insurance contract. The death certificate stated the cause of death as traumatic cardiorespiratory arrest. The attending physician, **Dr. Pattin,** stated that the death was accidental, using forms in the format used by insurers, without a requirement for a scientific explanation.

The insurer could have specified the type of proof or evidence required to support a claim, but the insurance contract contained no requirement that the claimant submit an expert opinion linking the accident to the accidental death. Instead, the contract stated that Allstate would send a request for additional information if the proof of loss was insufficient. Allstate never requested further proof from the claimant, implying the proof received was sufficient. While Allstate investigated the claim for 18 months, ***Dr. Pattin died***. Years later, after the trial had begun, Allstate demanded expert opinion (which Pattin could not provide).

Siguel served Allstate with a set of admission, document and interrogatory requests. Allstate intentionally refused to respond in a timely fashion to the admission requests or to seek a timely extension of time to respond. Thus, the admissions were deemed admitted on 5/91 (FRCP 36). Allstate knew when the responses were due and had held numerous meetings with Siguel. Siguel needed the responses promptly to conduct discovery in Argentina during that Summer of 1991. Relying upon the admitted admissions, and in compliance with Rule 11, Siguel stopped discovery investigations. After Siguel told Allstate that he was moving for summary judgment, Allstate requested an extension of time to respond to the admission requests and moved to withdraw the admitted admissions.

Several months later the Court found "excusable neglect" and lack of prejudice to Siguel and allowed Allstate to withdraw the admitted admissions. There were no unusual circumstances that would allow the Court to ignore the time limit of FRCP 29(2) and 36. The USDC found no prejudice to Siguel in the > 4-month delay; the costs of

compelling responses and filing for summary judgment; the hundreds of hours of communications to obtain a response from Allstate and argue the issues in USDC; the irreparable harm to discovery in Argentina that had to be postponed by almost one year (making it practically impossible to find witnesses), and in the unfair depletion of Siguel's financial and time resources not compensated by Allstate.

Allstate defended its failure to respond in a timely fashion to the first set of interrogatories and document requests on the grounds that Siguel had refused to allow an untimely response to admissions. Allstate served untimely responses/ objections to the second and third sets of interrogatories and document requests. Allstate refused to respond on time to Court orders to file joint stipulations of fact, to prepare joint stipulations for discovery in Argentina and various other pre-trial procedures.

At trial, Siguel presented evidence that the insured suffered the unexpected event or injury, **CRA,** which caused his death, that Siguel provided Allstate with the proof of loss required by the contract, and letters from the attending physician stating that the insured died accidentally. The Judge ruled that Siguel must identify an accidental event other than **CRA**, the accidental event or injury that caused the death. The USDC rejected Siguel's contention that "**CRA**" constituted the required accidental event or injury and instead required *another* "accidental" event.

> "There is not any identification in the evidence before me of anything that was done wrong in the medical procedure which might be thought of as an accident from the perspective of the patient, nor is there anything identified for me in the evidence of any identified event of any kind that was accidental". [3]

[3] Trial Judge Tr 5-73, 74). This statement illustrates the Court's error of law. It does not matter whether anything was done wrong in the medical procedure. This is not a malpractice claim. Even if everything was done right, the insured could die due to ***unknown*** iatrogenic factors. Accidental deaths due to unknown iatrogenic factors are common. What matters are the expectations of the insured, not what the physicians or hospital did or failed to do. If the insured did not know why he died, or did not expect to die, his death was accidental.

The trial Judge admitted the death certificate and reports of the attending physician Dr. Pattin into evidence but, under the Federal Rules of Evidence (**FRE**), gave no probative value to this opinion because Dr. Pattin had not provided a scientific explanation of the cause of death in his reports. ***Even though this is a breach of contract, and not a tort case***, the USDC required the plaintiff to obtain expert medical testimony (beyond the death certificate and report of the attending physician) that linked an accidental event to the death using scientific expert opinion.

> The trial Judge also found "that [the deceased] expected to continue to live, that he did not expect to die on the hour, on the day when he died" (Tr 2-46 L 5,7), and "the fact that [the deceased] was in reasonably good health and expected to continue to live and did not expect to die as quickly as he did and certainly did not expect to die on the day that he died", and plaintiff did not "need to prove that". (Tr 2-46 L 12,16). "So though I accept the fact that neither the . . .[deceased] nor those treating him expected that death would result as soon as it did at the time that it did, that does not meet the burden of proof that the plaintiff has to show (A) some kind of accident and (B) some kind of causal connection between that accident and the death." (Tr 5-75 L 4-10, Tr 5-78, 5-79).
>
> "I am assuming that this death [w]as accidental in the very broad sense in which you're using the term" Judge Keeton Tr 2-48, L 18-20. Siguel has "to offer evidence to support a finding by the Court that the death was caused by an accident, and it has to be expert opinion testimony" (Tr 5-58 L 22-25). "You have got to prove that there was an accident and that that accident was a cause of the death" (Tr 5-59 L 14).
>
> "You [Siguel] must offer as part of your case some expert opinion testimony that there was some causal link between some identified accident and the death of your father, and if you fail to do that, you lose, . . ." (trial Judge, Tr 4-103, 4-104).

Judgment was entered against Siguel. Siguel filed a motion requesting reconsideration and clarification of the

USDC's interpretation of accidental death law, or a new trial because Allstate withheld the only copy of a transcript of testimony of a key physician-witness named Pinto (an agent for Allstate) until the end of the trial.[4] The USDC denied Siguel's motion for reconsideration and new trial asserting that Siguel's arguments were essentially the same as those made during trial, and had already been considered. It entered final judgment against plaintiff on 3/9/94, later upheld by the Court of Appeals. Appendix A.

REASONS TO GRANT A WRIT OF CERTIORARI

Several undisputed facts form the core of this appeal. Defendant Allstate repeatedly violated time limits of **FRCP** and Court orders. Plaintiff Siguel was denied counsel to assist him at trial. The insured died unexpectedly. The Court imposed a tort-like proof of loss requirement for expert testimony that was not part of the proof of loss provision of the insurance contract.

The Court made it practically impossible for plaintiff to prevail when it arbitrarily imposed burdens of proof far greater than those required by the insurance contract, and excused the insurer from violations of **FRCP**, Court rules, and intentional delays. The USDC further compounded this prejudice when it refused to compensate the plaintiff for the consequential damages that crippled his ability to present his claim. The Court's action protects insurance company shareholder's profits at the expense of consumer rights.

A ***pro se*** plaintiff is entitled to the assistance of counsel like any other party, to prepare motions, to search and to interpret court rulings, to prepare documents, etc. The Court may not discriminate against *pro se* parties by imposing restrictions that effectively eliminate their right to access the Courts. The trial Judge erred and abused his discretion when he imposed a self-created non-discretionary

[4] Pinto's transcript was essential to provide expert testimony on the cause of death and to interpret documents written by Dr. Pinto (hired by Allstate to investigate the medical cause of death) which the Court had allowed into evidence. The transcript and audio recordings of Pinto's statements were withheld by Allstate despite multiple requests.

local rule prohibiting Siguel from having counsel to assist him. The Court denied Siguel the use of counsel *as a matter of policy*, without constitutional due process. As a result, Siguel could neither adequately respond to matters that arose during trial, nor present his case equitably and fairly.

May judges create rules that constrain *pro se* parties from accessing Courts and proving their claims? May judges prohibit *pro se* parties from using computers, or copy machines simply because there is no statutory right to such use? Siguel's ability to prepare for and present his case was further impaired by the cumulative effect of delays, unfair costs incurred by having to move to compel Allstate's compliance with FRCP, and the USDC's refusal to order Allstate to compensate Siguel for Allstate's wrongdoing.

The insurance policy covered ***any accident anywhere***, including a death caused by the accidental injury "**CRA**". Siguel submits that, to collect on the $60,000 claim due to any cause, anywhere, **he needed to prove only that the end result, death, was accidental, i.e., unexpected** (within the reasonable expectations of the deceased), or, alternatively, the event or injury CRA was accidental. In contrast, the $200,000 claim requires proof of an accident while occupying public transportation, but the form of proof is determined by the contract. By contract, Allstate should be allowed to agree to pay without expert testimony.

Siguel submits that he does not have to find any "accidental event" at the hospital that caused the death. ***In a death due to unknown, iatrogenic causes (and thus accidental), the "accidental" factors are unknown.*** Alternatively, Siguel only needed to prove that "**CRA**" was an accidental event from the perspective of the insured. The undisputed death certificate is sufficient proof that death was caused by **CRA**.[5] The USDC found that the insured did

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[5] Cardiorespiratory arrest (**CRA**) is an event and also an injury which can be accidental and cause death. CRA was the event preceding death, and the cause of death stated in the death certificate and in the denial letter. Thus, expert opinion is not needed to link CRA to the death. The expectations of the deceased determine whether CRA was unexpected.

not expect to die when he did, which is logically equivalent to finding that the injury CRA was accidental/ unexpected.

A death is accidental when the result is unexpected from the injured's viewpoint. *Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077 (C.A.1, 1990). The plaintiff need only prove that the death was accidental. However, the insured can limit, by contract, which accidental deaths are covered and reject those excluded by the policy. Dr. Pattin's statements linking the accident in the bus to the abscess drained at the hospital causing **CRA** met the "proof of loss" required by the insurance contract. Having met these requirements, the burden of proof ***shifts*** to Allstate to prove otherwise.[6] Judgment against the plaintiff was in error because the USDC gave no weight to Dr. Pattin's statement, which was written in the manner required by insurers. The USDC should not discard the attending physician's statement because it does not explain the intervening steps between the bus accident, the abscess and death. The USDC's demand for expert opinion *at trial* practically shifts to the claimant the need to pay for an exam/autopsy, which Allstate agreed by contract to pay if needed, and drastically increases the proof of loss over that required by the contract.

Allstate should ***be estopped*** from changing the contract and making a *new requirement at trial time*. The USDC ***could balance*** the credibility of a well articulated explanation against a lesser articulated one. However, if Allstate offers no alternative explanation, Dr. Pattin's statements, which met the proof of loss requirement of the contract, ought to be sufficient to grant judgment to Siguel.

Moreover, the USDC's requirement that Siguel identify an *accidental* **event** (rather than an *accidental* **injury**) is an illegal and impractical ***means test*** (in Mass. and Illinois). The need for expert testimony that explains all links between an accidental event and death creates requirements that were not part of the contract; it practically compels claimants to pay for an autopsy every time; it is scientifically capricious and ambiguous; it creates

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[6] Allstate can use medical or expert testimony to prove the death was expected by the deceased or an exception to the policy applies.

a loophole that allows insurers to deny health claims and would cost billions to society in additional paperwork. A better legal standard is to admit medical testimony as proof of loss in the manner usually done when physicians complete health claims in common medical situations, and let the trier of fact weigh all the evidence. Allstate ***may, by contract, agree to accept a statement signed by a physician as sufficient proof of loss, as most insurers do.*** In a contract of adhesion, proof of loss not specifically required or defined should not be required.

The proof of loss required by the contract, submitted by Siguel and accepted by Allstate is sufficient proof that Siguel complied with the contract terms. The burden of proof should then shift to Allstate. Allstate may introduce evidence to dispute that the death was accidental, or that one of the exclusions of the policy applies.

Under *American Airlines v. Wolens, infra,* the expectations of the parties ought to be respected and contracts must be interpreted according to their intent. Contrary to the above decision, the Court of Appeals mandates a tort-like proof even though the parties never agreed to such a requirement. The Court rewrote the insurance contract so that Allstate does not need to pay.

In response to interrogatory requests, Allstate should have stated that it rejected payment because the claimant did not submit expert testimony. Having failed to take any of these actions, Allstate should be precluded from defending at trial on the basis that the claimant did not present expert testimony. The lower Court should not rescue the insurer from its failure to incorporate appropriate contract terms, explain the reasons for denying liability as required by insurance laws, and comply with discovery requests.

For a non-corporate plaintiff with limited resources, wasted time and money is prejudice. A party who violates the FRCP should be required to compensate the other party in order to receive "reprieve" from the FRCP and be allowed to respond late or withdraw admissions.

The USDC's decisions encourage insurers and parties with deep pockets to violate the **FRCP** and to abuse justice

until a small plaintiff's resources are depleted. Ruling that the failure to comply with the FRCP entitled Allstate to equitable forgiveness was an abuse of discretion because it transformed a common, recurring, delaying tactic, into a Court-approved strategy to oppress an adversary with limited resources. The USDC encourages rules violations when it allows intentional and common behavior to qualify as unusual extenuating circumstances (to allow withdrawal of admitted admissions) or as excusable neglect (to authorize responses to admission requests long after the due date). The USDC erred when it refused to find prejudice in Allstate's lengthy delaying tactics which impaired Siguel's discovery, and which unfairly increased his costs.

In *Tome v. United States,* 63 U.S.L.W. 4046 No 93-6892, (Jan 10 1995), the Supreme Court recommends that rules be interpreted as indicated by the rules committee.[7] The Court of Appeal's interpretation of "prejudice" in FRCP 36 contradicts explicit Supreme Court rulings which prohibit benefiting from violations of the rules. The Court created "loopholes" that void the time limits and the meaning of FRCP 6(b) ("excusable neglect") and frustrate the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership,* 113 S.Ct. 1489 (1993). The rules ***must be interpreted in a way that deters parties from freely ignoring deadlines to win a permissive reprieve*** (*Pioneer at 1498*). Under the lower Court's ruling, there is no need to respond to admission requests as long as a party states how it intends to respond: because the other party may know the probable response, there can be no "sudden" need to obtain evidence (and thus implied admissions can be withdrawn).

Actions of the Court that rewrite the FRCP are reviewed as errors of law because the District Court has no such discretion. Only those actions which allow the District Court to weigh facts and exercise discretion in applying law

[7] The time to respond to FRCP 36 was extended to its current limits to allow sufficient time for parties to respond at the beginning of a case, to minimize disputes and the need for an extension of time. See discussion of Rule 36 amendments in West's FEDERAL RULES OF CIVIL PROCEDURE.

and rules are reviewed under the abuse of discretion standard. When the Court did not weigh any facts in applying existing laws and rules, the Court did not exercise its discretion. ***Thus, denying Siguel the assistance of counsel was an error of law.***

Introduction

This case is about equal access to Courts, enforcing the FRCP, validity and reliance upon insurance contracts. The lower Courts drastically impair *pro se* parties' ability to succeed with their claims. The Court allows violations of FRCP to cause delays and huge expenses to small parties and make it prohibitively expensive to pursue civil claims. The costs of such delays are minimal to the defendant and gigantic to the plaintiff. Because it imposes no sanctions for intentional delays, the Court's decision encourages abusive discovery practices. Courts must not allow attorneys to frustrate the rules designed to impose equality among parties of vastly different resources. This Court should show that "*civil*" procedure is not dead and rules, whose purpose is to make parties equal under the law, have "teeth".

Several fundamental issues characterize this case. The defendant-insurer is in the business of litigating claims. Allstate knew what it was doing: its wrongdoing and delaying tactics were intentional. Allstate's reasons for violating the rules did not involve unusual, extenuating circumstances, but common pretrial events. If Courts refuse to sanction behavior that will, on a statistical basis, lead to favorable settlements to insurers (because plaintiff's resources are depleted, witnesses are no longer available or legal counsel is difficult to obtain because the case is not cost-effective), then intentional violations of Court orders and FRCP will become part of the insurer's legal strategy.

What makes this decision frightening is that Allstate admitted it knowingly and willfully violated the law (failure to comply with time limits or Court orders), yet the Court refused to compensate Siguel for the damages resulting from Allstate's wrongdoing. Such "discretion" is abusive and unconscionable, not just arbitrary and capricious. If Courts apply the same reasoning in this case to other cases under

practically identical circumstances, then *it is extending the time limits of the FRCP to defendant insurers.* If the district court intends to apply different criteria to other parties under similar circumstances as those in this case, it is acting arbitrarily and capriciously.

Under the trial Court's approach, the best strategy for an insurer is to "investigate" facts slowly and to deny payment for as long as possible. At trial, the insurer will insist on expert testimony based on scientific evidence linking an accidental event to a death. This testimony will often be impossible to provide without a timely autopsy.

There is a popular perception in America that the legal system is biased towards the rich (be it individuals or corporations). The civil justice system is becoming a lottery where some players hold far more winning tickets than others. These problems do not require legal reform, only the effective application of existing rules.

1. ASSISTANCE OF COUNSEL

The Court denied Siguel's written request to be assisted by counsel (not "co-counsel" as the Court of Appeals suggests).[8] District Court J. Keeton stated his unique rule

[8] Siguel was not asking for a court-appointed or taxpayer-paid counsel. Because the USDC did not allow Siguel to have additional counsel, Siguel could not enter into an agreement contingent upon outcome and recovery of legal fees. Siguel was barred from having counsel in Court and at trial, when it was most needed. In accordance with the trial Judge's orders, Siguel was forced to rush from the witness stand to the attorney's table whenever a legal issue was raised, and return to the witness stand to testify. This procedure severely disturbed his note-taking and thought process. While testifying, Siguel could not make notes of what the Court was saying or review legal notes in preparation for further responses to complex legal issues raised during the trial. These problems would have been resolved by the presence of counsel. Allstate's attorneys, on the spot, were able to listen to testimony, take notes, review case law or rules, and suggest appropriate courses of action. Siguel *pro se* was not allowed to have a lawyer who could assist with effective questioning, discuss or suggest strategy, raise objections, make offers of proof and argue findings of fact and law. Under the conditions imposed by the trial Judge, it was impossible for Siguel to present and argue his claim fairly.

"I never permit a combination of a lawyer and pro se party". Contrary to the Court of Appeals' statement, Siguel did not ask for "hybrid representation" or object to Allstate's use of "local counsel". Siguel represented himself, but wanted other counsel to assist him for purposes such as taking notes, looking up material while he spoke, providing legal advice, etc. Some cases required a *pro se* party to discharge his attorney and clearly delineate who is responsible for the case, which Siguel did.

The Court of Appeals found that because there is no statutory right to be assisted by counsel, the Court could prohibit it. The same argument applies to the use of computers, copy machines, taking notes, etc. Many benefits are not explicitly stated in statutes, but must be provided in a manner that requires fair application if parties are to have meaningful access to the legal system. Siguel could not find any law that authorized attorneys to use lap-top computers or high speed copiers. Is a Judge allowed to prohibit *pro se* parties from using computers while corporate defendants may use them? *Because the rule established by the Court is decisive and precise, every judge ought to follow it; otherwise the ruling would be arbitrary and create further unfairness.*

There is a statutory right of high standing to self-representation in civil claims. 28 U.S.C.A.§1654. Access to the Courts includes access to means to effectively use them.[9] Counsel is essential for trial, not a mere ornament. The Court denied due process and violated the First Amendment when Siguel was denied the assistance of counsel which caused him to lose the right to collect the insurance claim. When judicial access restrictions deny a meaningful opportunity to be heard, due process is denied. *Logan v. Zimmerman Brush Company*, 455 US 422, 430, n.5 (1982). Prohibiting assistance of counsel drastically restricts plaintiff's ability to present his views and petition the Government for redress. "A right to meaningful access to court is implicated by denials of adequate legal

[9] *Bounds v. Smith*, 430 US 817, 828 (1977), *Wolff v. McDonnell*, 418 U.S. 539, 577-580, 94 S.Ct. 2963. 2985-2988, 41 L. Ed.2d 935 (1974) (inmates entitled to administrative assistance, etc. in civil rights case).

representation".[10] While judicial access may be restricted through reasonable procedures, when the requirements deny a meaningful opportunity to be heard, due process is denied. *Boddie v. Connecticut*, 401 US 371, 377 (1971).

A Judge cannot create his own rule that, as a matter of "policy", denies *pro se* parties assistance by an attorney. A *pro se* plaintiff is entitled to have his request for assistance of counsel judged on its particular merits. For the trial Judge to base his denial, ***as he said he was doing***, on his own general policy rather than a particularized consideration of the merits, is a ***denial of constitutionally protected due process***, since a non-discretionary decision based on a rule created by one Judge involves no process at all. The denial of the request for counsel effectively destroyed Siguel's ability to present his case and argue the law. These are not trivial prohibitions.

2. ACCIDENTAL DEATH CLAIM

The Court requires an accidental event ("accident") to cause the death. Siguel meets such requirement with the accidental occurrence, CRA. This accident also meets the policy requirements for accidental death caused by an accidental injury.

The Court of Appeals adopted Allstate's definition of "**injury**" as "**bodily injury** caused by an accident". Allstate's circular definition of injury is inherently ambiguous because "**bodily injury**" is not defined. Thus, it should be construed against Allstate (see cases below). Any reasonable "bodily injury" should meet the contract requirements. **Bodily injury** is any impairment of the physical condition of the body. Obviously, a heart or lung injury is an impairment of the body. The Court of Appeals

[10] AMERICAN CONSTITUTIONAL LAW. Lawrence H. Tribe, 2nd Ed. The Foundation Press, NY 1988, ¶ 10-18 ("Meaningful access to Judicial protection as a separate strand of due process doctrine"), p.757. "Restrictions operating to limit a litigant's choice of competent counsel to any significant degree, and thus constraining the litigant's ability to petition the courts for redress, might yet be subjected to close first amendment scrutiny."

also spoke of "**accident**", but failed to realize that "accident" refers to an occurrence. An "**accident**" means an **unexpected happening** without intention or design (i.e., an accidental event). *Henderson v. Travelers Ins. Co.*, 160 N.E. 415, 262 Mass. 522 (Mass, 1928). A happening is an "event", "occurrence" or "result". One must distinguish between "**accidental events**" and "**accidental results**". With bodily injury and accident defined, an "injury" covered by the policy is an injury to the body (i.e., heart injury) caused by an unexpected happening or event which caused death. The event CRA suffered by the insured meets the contract's requirement for an "**unexpected happening**" that caused a bodily injury (heart damage) and death.

To determine whether CRA was accidental, one must look at the expectations of the insured. The Michigan Supreme Court held that "the question is not whether the death was reasonably foreseeable, but whether the death was in fact foreseen by the decedent."[11] The Court stated that *Wickman's* expectations of the parties (*supra*) did not apply because there were "no allegations that the insured's conduct contributed in any way to this death. Thus, his expectations regarding when he would die are immaterial." (Appeals at A-6). **This position is incorrect**. The insured intentionally had his abscess drained and unexpectedly suffered CRA after treatment. This is similar to an acrobat hanging from a bridge, dropping and unexpectedly suffering CRA **after** hitting the ground (compare *Wickman*).

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[11] *Collins v. Nationwide Life Ins. Co.*, 409 Mich 271, 277-78, 294 N.W.2d 194, 196, 197 (1980). Death resulting from the unforeseen and extraordinary consequences ensuing from the performance of an act is an accidental death caused by such act. The court may thus draw the legal inference that the insured died unexpectedly from surgery. *Lee v. New York Life Ins. Co.*, 310 Mass 370, 38 N.E.2d 333 (1941) (a deceased died accidentally during surgery because such result was considered remote by the physicians and therefore unexpected). In the present case, the deceased suffered death because the heart and lungs unexpectedly stopped working on their own (unexpected CRA). *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska Supreme Court, 1975) (Death from cardiac arrest following surgery was held accidental since it was unexpected and unforeseen).

Siguel identified an accidental "occurrence" or "happening", cardiorespiratory arrest (CRA), which caused death. The Court has not explained why this "occurrence" or "event" is precluded by the contract.

CRA is something that happens to the body, in the same manner as the rupture of an aneurysm. Being hit by a truck, like suffering CRA, is an occurrence. A heart may be harmed by an internal factor, such as CRA, or an external one, such as a truck. Some people get hit by a truck and survive. Some suffer **the event CRA** and survive.[12] When "a 3 ton truck hits a person", or when "CRA" occurs, many cells in the heart die within a few minutes. In contrast to older cases or other jurisdictions, in Illinois and Massachusetts, an accidental death can be caused by an accidental event within the body, such as CRA.[13]

It is irrelevant whether the events preceding CRA were intentional or accidental in a policy which insures against **any death** by "accident". What matters only is whether CRA was itself accidental, i.e., unexpected by the insured (only with regard to the $60,000 claim; however, the presentation of facts for the $200K claim depend on the resolution of the $60K claim). When "the insured did not act with death as the expected result of the conduct in which the insured engaged, then the death of the insured is considered accidental." *Kennedy v. Washington Nat'l Ins. Co.*, 136 Wis 2d 425, 401 NW 2d 842 (1987). Allstate could have excluded CRA from its list of covered accidents, but did not. The insurer must clearly state what conduct or condition is excluded. *Buck v. Gulf Life Ins Co.*, 548 So 2d 715 (Fla App 1989).

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[12] CRA does not always lead to legal death. Sometimes people are resuscitated. CRA is not always unexpected. Risky surgery, war, and cocaine abuse have a significant risk of CRA.

[13] *Lee v. New York Life Ins. Co.* of N.Y., 310 Mass 370, 38 N.E.2d 333 (Mass 1941) (there is no distinction between an accidental cause and result, and there is no need for an external force applied to the body that caused the injury). 50 Illinois Administrative Code § 2007.50, § 2001.20(h) and § 2001.20(h)(2) state: "Terms such as 'external' and 'violent' in connection with the definition of accident . .. are not acceptable."

No person would go into **elective** surgery if he knew that by so doing he would suffer CRA and die. The evidence admitted at trial proves that CRA was unexpected by the insured, his physicians, and Allstate. The Court's finding of fact that the insured did not expect to die when he did proves that the insured did not expect to suffer CRA.[14]

The lower Court created an illegal means test by requiring proof of an accidental event for <u>every</u> claim. This requirement would apply to death caused by a bus accident, but not to the accidental death under the $60,000 policy. The cases cited are old cases no longer relevant because current regulations makings means tests illegal were not discussed. Means tests are illegal by law (in Massachusetts) rather than by common law. The Court has no authority to reintroduce them.

Requiring an accident to prove an accidental death is equivalent to requiring a means, an unexpected happening, which is a means test.[15] The cases cited by the Court of Appeals do not deal with the issue of ***any*** accidental death (covered by the policy in litigation). The Court of Appeals claims that Siguel cites no support for his proposition that the policy must be interpreted in accordance with a "results" definition. However, in Massachusetts, "[a]ccident . . . shall be defined to employ 'result' language and shall not include words which establish an accidental means test . . . ".211 Code of Massachusetts Regulations § 42.06(4). The Court of Appeals must respect the intent of the state in eliminating a means tests as part of the definition of accidental death.

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[14] If the death were unexpected, so was CRA. The Court explicitly found "that [the insured] was in reasonably good health and expected to continue to live . . .". (Tr 2-46 L 12,16). The logical equivalent of this finding is that the insured did not expect to suffer CRA.

[15] As Justice Cardozo stated in his dissent: "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 54 S.Ct. 461, 78 L.Ed. 934 (1934).

The Court of Appeals stated from *Appleman* that "a court may require that the accident be a proximate cause of the injury or death" This argument confuses different types of accidents and modern regulations (*supra*). For the $60,000 claim, any accidental result is eligible. For other deaths, such as the $200,000 claim, there must be an accidental event ("accident") in a bus that causes the death.

The Court cited *Couch on Insurance* (*Appeals at A-4*) "where the death is not designed and not anticipated by the deceased, though it is in consequence of some act voluntarily done by him, it is accidental death". "Going into surgery to have the abscess drained" meets the "act" referred to by *Couch* for the $60K claim (this is similar to engaging in an act that is not expected to lead to death). Because the death was neither designed nor anticipated by the insured, **it was an accidental death according to the Court of Appeals' own definition.**

An **"accidental" death** is a death which is unusual, unexpected, or unforeseeable. *Davis v. Continental Casualty Co.*, 560 F.Supp. 723 (N.D. Miss. 1983). The lower court's requirement for an "accident (i.e., an "accidental event") as part of the definition of accidental death, reintroduces an illegal means test. The Court of Appeals defines an "***accidental means***" test as the "means which produced death or injury must have been unintentional" (Appeals at A-4). By requiring an accidental event, the lower Court requires a mean test (an unintentional means or accidental means which produces the death).

The old cases cited by the Court were decided long ago and are no longer relevant in light of the modern regulations prohibiting means tests.[16] The quote from *Couch on Insurance* (Appeals *at* A-6) stating that the "mere fact that

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[16] The Court cited a statement by Couch, that "[w]here there is no occurrence which may be deemed an accident, it necessarily follows that the harm sustained as the consequence of a disease is not within the coverage of an accident policy." Referring to an "occurrence" is a reference to a means test. This statement is irrelevant for the $60,000 claim which only requires an accidental result.

the insured dies . . . as a result of such treatment [medical treatment] does not constitute an accident . . ." is irrelevant because it ignores the insured's state of mind.[17] The insurance policy's requirement that the death be caused by an "accident" (A-3), is an illegal means test if it refers to an "accidental occurrence" rather than an "accidental result". The Court's reference to *Carlson v. New York Life Ins. Co.* 76 Ill App. 2d 187, 196, 22 N.E. 2d 363, 368 (1966) is also irrelevant to the issue in dispute, dealing as it does with the distinction between the effects of an accidental event vs. a preexisting illness.

The lower Courts demand expert testimony. This tort-like requirement that was not part of the contract intended by the parties, drastically revises insurance contracts, and imposes a higher burden at trial than when the claim was submitted, thereby encouraging litigation and fraud by the insurer.

There is a large difference between allowing expert testimony and demanding it, or between requiring expert testimony for the defense **or** as part of the prima facie case for the plaintiff. While expert testimony may help the trier of fact, such evidence was not required by the contract and should not be mandated at trial. ***Tort-like principles are not applicable to insurance contract law***. *Am. Family Life Assurance Co. v. Bilyeu*, 921 F 2d 87 (6th Cir 1990).

The fact that experts testify concerning accidental death claims is irrelevant to the issue of whether the court can impose a new requirement which can make it impossible for

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[17] For example, a patient may have a brain aneurysm, severe coronary artery disease and kidney failure. He is told that he will die unless he gets a new heart and his aneurysm is repaired. He receives surgical treatment, either because a car hit him, or because a mosquito bit him (a major accident or a trivial event). Before surgery he is told that the chances of surviving without surgery are 1/100,000,000 (because of his condition, not because of external events). With surgery they are 1/1000. He chooses surgery and dies because the aneurysm, as expected, blows up when the brain is opened and the heart fails during the surgery. There is no "accidental result" here. Obviously, as Couch states, the mere fact that the insured dies as a result of treatment does not constitute an accident; Siguel never argued otherwise.

a plaintiff to prove an accidental death. This tort-like requirement was never mentioned in the insurance policy, discovery requests, reasons to deny coverage, etc., but the lower court imposed it anyway. It was never required as proof of loss to perform under the terms of the contract.

By contract, the parties may agree to the nature of the proof to be offered. An insurer may agree to pay upon a claim if the claimant submits a letter describing the injury suffered, an affidavit describing the nature of the loss, or a doctor's statement as proof of loss and of proximate cause. In most health/injury claims, insurers only require that a physician complete a form with simple Yes/No responses.

In a contract of adhesion, proof of loss not specifically required should not be mandated. The lower court erred (applied a tort standard) when it mandated proof of loss beyond that required by the contract.

Life insurance policies on individuals are considered contracts of adhesion, which are narrowly construed against the writer. *Spychalski v. MFA Life Ins. Co.*, 620 SW 2d. 388, 392 (Mo., App., 1981). A "reasonable expectations" test is usually applied to interpret clauses in insurance contracts.

Ambiguities in a policy are to be construed against the insurer; and exclusions from coverage are to be strictly construed. *Where the language permits more than one rational interpretation, that which is most favorable to the insured is to be taken.*[18] The proof requested by the insurer when the claim was filed should meet the claimant's duty of performance under the contract and in later litigation.

The insurer could have a clause to require expert testimony as proof of loss, or to exclude deaths caused by CRA unless CRA itself was caused by a ***separate,*** unexpected event. But Allstate had none of these clauses (*as many other insurance policies do*). The Court should not change the terms of a contract of adhesion and create terms

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[18] *Morin v. Massachusetts Blue Cross, Inc.*, 311 N.E.2d 914, 365 Mass. 379 (Mass, 1974). In *Webb v. Allstate Life Ins. Co.*, 536 F.2d 336 (1976), the appeals court reversed summary judgment in favor of Allstate and stated that "exceptions from coverage are to be strictly construed against the insured when their application is *doubtful" (Webb* at 340).

for proof more onerous than those already in the contract.

In *American Airlines v. Wolens*, No. 93-1286, 63 US Law Week 4069, 4070 (1995), the Court stated that **contracts are "privately ordered obligations" whose "terms simply hold parties to their agreements".** The "key to sensible construction" of the law is an understanding of the reality that **"[t]he stability and efficiency of the market depends fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time."** 63 US LW 4070.

It is not a "sensible construction" [of a contract] when a Court changes the terms to make them different than those agreed to and perceived by the parties when the contract was made. In this insurance contract there are no laws or regulations that require expert opinion. The Court must look at the perceptions of the parties when the contract was made. Having done so, it is obvious that there was never any hint or clue that an expert opinion would be required from the claimant-plaintiff. The insurance contract did not require the claimant to submit an expert opinion or autopsy findings linking the accidental injury to the accidental death as part of proof of loss. In fact, ***Allstate specifically told the claimant that expert testimony was not required.***

Allstate admitted the proof of loss as submitted and indicated that no further information was required from the claimant. Never, during the course of several years of correspondence and discovery, did Allstate indicate that an expert opinion was required as part of the contract. This new requirement would flood the Courts with litigation because insurers, bound to shareholders to defend against baseless claims, ought to reject any claim not supported by an expert opinion with a detailed scientific explanation.

Allstate should be estopped from denying payment for lack of expert testimony linking an accident to the death; its defense at trial should be limited to the reasons explicitly stated when payment was denied.

If Allstate intended to require expert testimony, it should have said so in the contract. It should have

explained that the claim was rejected because there was no expert testimony, in accordance with state insurance regulations that require an insurer to explain the reasons for denial of payment. (M.G.L. c 176 D § 3 (9)(n); similar statute in Illinois).

3. WITHDRAWAL OF ADMITTED ADMISSIONS[19]

The Court allowed Allstate to withdraw its admitted admissions. The Court erred when it found Allstate's intentional behavior to be excusable neglect, when it refused to compensate Siguel for the costs due to Allstate's violation of FRCP, and when it failed to find "prejudice" in Allstate's delays, delays which crippled Siguel's ability to find witnesses and prepare for trial.

It is an abuse of discretion to transform a common, recurring delaying tactic into a Court-approved strategy to oppress an adversary with limited resources.

In finding excusable neglect and no prejudice, the Court stated that the "plaintiff's claim that she relied upon defendant's admissions in preparing her case is premature. Plaintiff just recently received the first response to her request for document production, and has yet to depose any witnesses. Plaintiff will have ample opportunity to gather evidence in support of whatever issues defendant may choose to deny before the case comes to trial." "Plaintiff's inability to proceed [with discovery in Argentina during 1991] was caused no more by defendant's two month delay in answering the admissions than by plaintiff's fourteen month delay in bringing the action". docket # 7, B-4.

The Magistrate's arguments are flawed. A party is entitled to rely upon the admissions at the beginning of a case to eliminate the need for unnecessary discovery.[20] An

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[19] The Appeals Court started its argument with the false statement: "Allstate and Siguel agreed to extend the time for the filing of the answers to the interrogatories and the responses to the document request." Siguel stated that such statements by Allstate were false and presented evidence that they were false. There are no documents that prove that an agreement was made and that it was approved by the district court as required by FRCP 29(2). Let Allstate prove otherwise!

[20] The Magistrate improperly limits the scope of admission requests to

attorney who spends money on matters no longer at issue, or fails to move for summary judgment based on admitted facts could be sued for malpractice. When a party's wrongdoing increases plaintiff's costs, prejudice exists.[21]

Allstate knowingly or intentionally refused to respond on time to Siguel's admission requests. The Supreme Court of Louisiana affirmed summary judgment on a claim of accidental death based on admissions deemed admitted. Allstate did not timely deny them, but instead alleged they had not been received. *Succession of Rock v. Allstate Life Ins. Co.*, 340 So. 2d 1325 (Supr. Ct. La, 1976), rehearing denied (1977). In the current case, Allstate knew that it had to respond on time, but instead chose not to do so. Allstate explained its delay as follows: "Allstate failed to provide a timely response because counsel believed that the plaintiff's attorney was considering an extension of time for responding to his discovery, and that any such extension would include the request for admissions." However, plaintiff did not and could not authorize an extension of time because stipulations extending the time provided for any responses "may be made only with the approval of the court". FRCP 29(2). Any agreement to extend time is not an excuse to delay filing a request for an extension of time.[22]

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those in effect under the old FRCP 36 (Appendix D-4). Judge Keeton upholds this erroneous application of rule 36 (Appendix at E-5). The comments to the rules and case law are quite clear that admission requests apply to facts, opinions and the application of law to facts.

[21] Otherwise the richer party would violate the Rules to bring the poorer party to her knees. Blaming the plaintiff for taking 14 months to file a claim is absurd and an error of law. Plaintiffs should not be sanctioned for taking the time to investigate the facts and negotiate with the defendant. The Court cannot impose a new legal duty that the plaintiff must explain why it did not file immediately after the claim was first rejected by Allstate. The Court cannot blame Siguel for investigating facts and learning the law before filing an action, or for Allstate's delays in responding to communications before litigation started. Siguel had a duty to comply with Rule 11.

[22] *Green v. Stokely Foods, Inc.*, 8 F.R.D 114, 11 F.R. Serv. 6b.31, Case 1 (ED Ill, 1948) (Judgment was awarded when a party failed to timely amend a complaint and there was no showing that the motion to extend time could not have been made properly within the time allowed; quoted

The USDC's action rewrites the time limits of the FRCP. To prevent its decision from being arbitrary, the Court would have to grant extensions of time to insurers who refuse to respond on time to admission requests when the lawsuit starts. Granting an extension of time was an abuse of discretion because it supports untimely responses as routine and ordinary ways to practice law. Extensions of time are to be granted only in unique or extraordinary circumstances. If common circumstances could constitute "excusable neglect", "the result would be an increase in the manufacture of excuses incapable of our [Court's] verification".[23] *Barnes v. Cavazos*, 966 F.2d 1056, 1061, 1062 (6th Cir., 1992). Judge Easterbrook **held** that treating common reasons as "excusable" neglect "would destroy the timing rules by converting every delay into its own reason for an extension. 'Excusable neglect' is a common term in rules of procedure, and we regularly hold that sloth, ignorance, and other negligence does not qualify." *In the Matter of Danielson*, 981 F.2d 296, 297 (7th Cir. 1992).

Siguel was entitled to rely upon the facts deemed admitted by Allstate. Allstate should not derive a greater benefit from their failure to comply with the FRCP than by compliance with them.

A request for admissions which is not timely and properly denied is deemed admitted (FRCP 36). A fact

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from Moore FEDERAL PRACTICE). In *Avanti Products, Inc.* v. *U.S., 1992 WL 129490* (U.S. Court of Int. Trade, 1992), one party apparently consented to late responses. However, **the Court stated that the party was not free to consent due to the rules**, denied untimely responses and said that the party's neglect presumably commenced well before the date the admissions were due (a party has no intrinsic right to wait until the last minute to seek an extension of time). Rule 29(2) prevents battles of counsel's affidavits arguing agreements to extend time. Thus, Allstate's arguments that plaintiff agreed to extend the time can not constitute excusable neglect.

[23] An excellent distinction between "reason" and "excuse" is provided by Marilyn Vos Savant (highest IQ in GUINNESS BOOK OF WORLD RECORDS) in "Ask Marilyn", Parade, 8/28/94:" A 'reason' is a persuasive basis for an action; an 'excuse' is a basis that is not persuasive."

deemed admitted may serve as the basis for a motion for summary judgment.[24] Admissions deemed admitted have the same value as if they were actually admitted; otherwise a party who admits them on time and then wants to change them would be worse off than a party who refuses to admit them on time and seeks their withdrawal.

Failure to comply with the rules should not be more profitable than responding on time.[25] A party can withdraw admissions deemed admitted if the requirements of Rule 36 are met. Alternatively, if they are not met, a party can ask to be relieved of the deemed admissions and be permitted to respond late due to excusable neglect.

If a party can admit liability when the case starts and then withdraw all admissions months later ***without incurring any costs***, it would be the defendant's best strategy to admit facts as soon as possible and induce the plaintiff to waste money on a motion for summary judgment. After the plaintiff stopped gathering evidence in reliance on the facts admitted, the defendant would move to withdraw the admissions and to substitute denials. A party whose failure to respond on time was not the result of excusable neglect should not be allowed to withdraw its admissions as easily as one who responded on time, and then sought to withdraw those admissions. If the burden were the same, the distinction between pre and *post* deadline filings would disappear, contrary to the intent of the Supreme Court.[26]

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[24] *Goodman v. Mead Johnson & Co*, 534 F.2d 566 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (deemed admitted for purposes of a motion for summary judgment). *Thalheim v. Eberheim*, 124 FRD 34 (D. Conn. 1988) (admissions not responded are admitted); *United States v. Kenealy*, 646 F.2d 699 (CA 1st, 1981), cert. denied, 454 U.S. 941 (1982). *Broadcast Music, Inc. v. Larkin*, 672 F. Supp. 531 (USDC. Maine, 1987).

[25] "a failure to request an extension should not mean that the party has a greater chance of being permitted a delay than if a formal [Bankruptcy] Rule 9006(b) motion had been filed and the 'excusable neglect' standard applied" (in dismissing an appeal that was late in designating issues and transcripts). *In Matter of Bulic*, 997 F.2d 299 (7th Cir. 1993).

[26] In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 895 (1990),

The Court erred when it found excusable neglect in Allstate's failure to make a timely request for an extension of time to respond to admission requests.

In *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 113 S.Ct. 1489 (1993), the Supreme Court defined "excusable neglect". "Inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect" (*Id at* 1496). The requirement must deter parties from ***"freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve"*** (*Id.* at 1498).

The Court indicated that "***were there any evidence of prejudice to petitioner or to judicial administration. . . , or any indication at all of bad faith***", a finding of excusable neglect would be an abuse of discretion (*Id.* at 1450); ***willful delays*** "***cannot be forgiven, regardless of the consequences***" (*Id.* at 1502) and "***indifference is inexcusable***". The implication of the Court's decision is that a party who repeatedly misses deadlines or otherwise acts in bad faith cannot be relieved of the consequences of its conduct on the basis of excusable neglect (*Id.* at 1504). The Court implied that neglect would not be excusable if a party "miss[ed] deadlines repeatedly despite clear warnings" or acted in bad faith. *Id.* at 1504. It is undisputed that Siguel repeatedly warned Allstate about the deadlines.

Before waiving the rules the Court must consider the defaulting party's excuse and its effect upon prejudice to the resisting party. *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377 (E.D.Cal. 1991). In an accidental death action, the request to withdraw admissions was denied because defendant had no reasonable excuse to respond late. *Kleckner v. Glover Trucking Corp.*, 103 F.R.D. 553 (D.C. Pa.,

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the Court outlined the two stage inquiry required before it allows a *post*deadline extension of time. Any interpretation of Rule 6(b) cannot eliminate the distinction between predeadline and *post*deadline filings (*Id at* 896, n. 5). (1) "First, any extension of a time limitation must be 'for a cause shown'" (2) "Any postdeadline extension must be 'upon motion made', and is permissible only where the failure to meet the deadline 'was the result of excusable neglect' " (*Id at* 896).

1984). Withdrawal has been allowed when the admission was *inadvertent* and, at most, excusable neglect.[27]

The prejudice that followed from allowing the admissions to be withdrawn precludes withdrawal. To eliminate the effects of prejudice due to expenses and delays, the Court must order the delaying party to compensate the opposite party for all injuries resulting from the admitted admissions.[28] Forgoing discovery on issues admitted is prejudice.

Admissions may be withdrawn only if there is **no prejudice** to the plaintiff. Any prejudice that affects the preparation for trial meets the prejudice requirement of Rule 36. Siguei was forced to postpone discovery in Argentina for almost one year because Allstate insisted on waiting until after the USDC ruled on its motion to withdraw admissions.[29] "Prejudice exists where a party forgoes discovery which would have been directed at factual issues concluded by opposing party's admissions." [particularly when plaintiff must "depose new, yet at this point undiscovered, witnesses to meet new factual issues" that had been previously admitted; *Coca-Cola Bottling Co. v.*

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[27] In *Farr Man & CO, Inc. v. M/V Rozita*, 903 F.2d 871 (C.A.1, Mass, 1990), the court allowed withdrawal of admissions because an inadvertent error was made in the calculation of damages and neither the plaintiff nor the defendant was aware of the error or relied on it to prepare for trial or conduct discovery. In *Coca-Cola Bottling Co. of Shreveport, Inc., v. Coca-Cola Co.*, 123 F.R.D. 97, 108 (D.Del 1988), a party was not permitted to amend admission responses because it failed to show that the admissions resulted from inadvertence or mistake (the "admissions are unambiguous, were not made by reason of inadvertence"). Withdrawal was allowed "when an admission is no longer true because of changed circumstances" *Ropfogel v. U.S.*, 138 F.R.D. 579, 583 (D. Kan. 1991).

[28] *Smith v. First Nat. Bank of Atlanta*, 837 F.2d 1575 (11th Cir. 1988), 10 Fed. R. Serv. 3d (Callaghan) 749, 101 A.L.R. Fed 739) cert. denied, 109 S.Ct. 64, 488 U.S. 821, 102 L.Ed.2d 41 (the Court awarded $18,275 in partial compensation for expenses caused by withdrawal of admissions when it allowed the admissions to be withdrawn).

[29] Plaintiff agrees with Allstate that it would have been improper to waste money with discovery in Argentina during the Summer of 1991 if the Court denied the motion to withdraw the admitted facts.

Coca-Cola Co., 123 F.R.D. 97, 107, n6 (D.Del. 1988)]

The USDC's assertion that plaintiff suffered no prejudice (*supra*, USDC decisions, addendum decisions 9/18/91 and 1/8/93), is not true. The Court must consider the limited resources of an individual plaintiff suing on a small insurance policy and the fact that the increased costs of motions and delayed discovery are disproportionate to the amount in litigation.[30] The Court's desire to have the case decided on its merits would have been fulfilled by requiring the oppressive defendant to compensate Siguel.[31]

It was never the intent of the FRCP that withdrawals be used as a delaying tactic. **The cases where prejudice was not found had the following elements in common:** (1) The admissions were ***admitted by neglect or error*** to notice the deadline or the fact admitted, not through a knowing or intentional action to respond late; (2) the ***wrongdoer sought to correct its error immediately*** when it was discovered, not months later as Allstate did; (3) the wrongdoer assisted with efforts to mitigate or nullify the prejudice, e.g., discovery and finding witnesses; (4) the court ordered the wrongdoer to compensate the opposite party for all costs that followed from the admitted admissions, including the costs of motions to withdraw, to compel and for summary judgment; (5) the error in admitting facts was an isolated event, not part of a pattern of multiple violations of FRCP and Court orders.

The Courts allowed withdrawal when lack of prejudice was obvious, such as when a party to whom the admission was made was unaware of the responses and never relied on them.[32] In *Gutting v. Falstaff Brewing Corp.*, 710 F.2d

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[30] Insurers are frequent litigants who benefit from a reputation for unreasonable litigation or settlement practices which deter plaintiffs or prospective counsel from seeking to enforce legitimate policy rights.

[31] *Davis v. Noufal*, 142 F.R.D. 258 (D.D.C. 1992) (to eliminate prejudice, the Court awarded the costs of preparing a motion for summary judgment based on the admitted admissions).

[32] This situation occurs when admissions were submitted after discovery was closed in lieu of a stipulation, or parties were unaware of the response, and no action was taken in reliance on the admissions.

1309, 1312, 1314 (8th Cir. 1983) the opposing party was not prejudiced by the late filing of responses because it had already obtained the necessary evidence through depositions (the court held that prejudice resulted when a party faced difficulty in proving its case because of a "sudden need to obtain evidence required to prove the matter . . . admitted.") In *Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192 (D. Conn. 1976), cited as *the* precedent in the *Brooks* case decided by the 1st Circuit, the plaintiff needed one witness and the Court and the defense helped him locate the witness and compensate the plaintiff. *Brooks Village North Assoc. v General Elec.* Co., 686 F.2d 66, 70 (1st Cir. 1982). Thus, the plaintiff had no increased difficulty in obtaining evidence after the defendant withdrew its implied admissions. In contrast to cases where no prejudice was found, Allstate interfered with or refused to facilitate the deposition of witnesses. Any material prejudice ought to meet the criteria for prejudice. Allstate may either cure the prejudice or respond late if its failure to respond was due to excusable neglect. Allstate gets two chances to correct its error only if it acts fairly and Siguel suffers no prejudice.

The Court of Appeal's decision alters "excusable neglect" and the time to respond to admission requests. The Court fails to give weight to these facts: (a) this case was delayed for months while the District Court considered Allstate's motion to withdraw the admissions; (b) Siguel spent considerable time and money compelling Allstate to respond to the admission requests (i.e., correspondence and motions filed); (c) discovery in Argentina was postponed by almost one year because Allstate refused either to stipulate discovery procedures or allow discovery to proceed while a decision on the admission requests was pending; and (d) Allstate never compensated Siguel for the delays in time and money.

Life is not endless. Passage of time is prejudice when it interferes with discovery and trial preparation.[33] Siguel was

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[33] Time is prejudice when it harms a party's ability to succeed at trial. The Court must consider the impact of time passage on all factors that

injured because he forewent discovery directed to factual issues which were the subject of an admission.[34] In *F.D.I.C. v. Prusia*, 18 F 3rd 637 (8th Cir., 1984), cited by the Court of Appeals, **no** prejudice was found when the admissions were withdrawn. There was no evidence that either time or money was spent by the relying party, or that witnesses or evidence could no longer be located. **The opposite is true in this case**. The Court of Appeals stated that prejudice requires a "sudden need to obtain evidence with respect to the questions previously answered by the admissions" and "there was no 'sudden need' for Siguel to obtain evidence" because he was on notice that Allstate was attempting to withdraw its admissions (Appeals *at* A-9). This emphasis on the word "sudden" and "being on notice" is incorrect. ***There is no such criteria for prejudice in rule 36***. In all circuits but this case, modern decisions allowed admissions to be withdrawn only when there was **no prejudice**.

CONCLUSION

The petition for writ of certiorari should be granted to prevent insurers from delaying payment until claimants can no longer obtain the evidence needed to prove their case, to establish fair treatment of *pro se* parties, to discourage abuse of the legal system, to allow parties to freely enter into enforceable contracts and decide how to prove performance under the contract, to provide guidance to the lower courts in situations relevant to most federal cases, and to impose uniform application of FRCP 29(2) and 36.

August 31, 1995 Respectfully submitted,

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affect the trial of the case, and, if any prejudice exists, it must either be cured or withdrawal must be denied.

[34] *Lee v. Sheller Globe Corp*, 115 F.R.D. 469 (S.D.Miss 1986). Also see *Apex Oil Co. v Belcher Co. of N.Y., Inc.*, 855 F. 2d 1009 (CA 2 NY, 1988).

APPENDIX A
United States Court of Appeals
For the First Circuit

No. 94-1392

BERTA MAIDANIK SIGUEL AND EDWARD N. SIGUEL,

Plaintiffs, Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before
Torruella, Chief Judge,
Selya and Boudin, Circuit Judges.

Edward N. Siguel on brief pro se.
Craig Browne, Daniel H. Conroy and Goldstein & Manello, P.C. on brief for appellee.

March 10, 1995

Per Curiam. This appeal concerns an attempt by appellant Edward Siguel to collect benefits under an accidental death and dismemberment insurance policy issued by appellee Allstate Life Insurance Co. to Siguel's father. The district court entered judgment for Allstate under Fed R. Civ. P. 52(c) after Siguel presented his evidence at a non-jury trial.[1]

In 1986 Siguel obtained the insurance policy from Allstate; he listed his father, Isidoro Siguel, as the insured and his mother, Berta Siguel, as the beneficiary. According to Siguel the insured, while in Argentina, sustained an injury to his left forearm from a blow he received while getting off a public bus. This accident occurred sometime in January 1988. On February 10, 1988, the insured went to a hospital outpatient clinic where a physician, Dr. Pattin, drained an abscess on the insured's left forearm. Later that same day, the insured died.

Siguel filed a claim in June 1988 on behalf of his mother for benefits under the policy. As proof of loss, Siguel submitted a death certificate which listed the cause of death as cardiorespiratory arrest; he also submitted two reports prepared by Dr. Pattin which stated that the insured's death was accidental. Allstate denied the claim on December 27, 1989. It had conducted an investigation and concluded that the cause of death was not the result of an accident as defined in the insurance policy. On March 28, 1991, Siguel filed an action in federal district court on behalf of his mother as the beneficiary.[2]

The parties engaged in discovery and the case was tried in January 1994. The district court first heard Siguel's evidence and argument that his father's death was accidental. It then made Rule 52(c) findings concerning the cause of death. The court initially determined that an accident had occurred on the bus. However, the court found that Siguel had not

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[1] Rule 52(c) provides that "[i]f during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party ."

[2] At this time, Berta Siguel was represented by her son and another attorney. For ease of reference, Siguel will be treated as the plaintiff except where his status as both an attorney and party is the issue.

demonstrated by a preponderance of the evidence that the accident had resulted in the insured's death. Specifically, the court concluded there were no causal connections, first, between the accident on the bus and the abscess and, second, between the abscess and the death. The court further stated that the existence of the link was not a matter that could be proved without the aid of expert testimony.

The court then rejected Siguel's theory that the medical treatment of the abscess itself was faulty, thereby constituting an accident which caused the death. The court stated that there was insufficient evidence from which it could find that the draining of the abscess was an accident. Again, the court opined that it required expert testimony to establish that there was something wrong with the treatment and that this error was responsible for the insured's death. The court also rejected Siguel's argument that because his father did not expect to die, his death was accidental; the court described this legal theory as incorrect and without any support in the case law.

II.

On appeal, Siguel claims that the district court erred by (A) ruling on the merits in favor of Allstate; (B) denying Siguel's motion for a new trial; (C) permitting Allstate to file late responses to Siguel's request for admissions; (D) disqualifying Siguel from representing his mother; (E) denying Siguel (who the court allowed to appear pro se after his mother assigned her claims to him) the right to have a lawyer assist him at trial; and (F) refusing to assess costs or sanctions against Allstate.

A. The Merits.

As with any case involving questions of insurance coverage, we start with the language of the policy. it provides benefits if the person insured is injured in an accident. Injury or injured is defined as meaning

> bodily injury caused by an accident occurring while the insurance is in force and which injury results within 365 days after the date of the accident, directly and independently of all other causes, in death or any other "Loss" covered by the Policy. (emphasis added).

If an individual is injured while a passenger on a public

conveyance the benefit is $200,000. In other cases the benefit is $60,000.

Siguel first argues that the district court should have used the "accidental results" approach to interpreting this kind of insurance contract and that it instead erroneously[3] used an "accidental means" test. Under the latter test, "the means which produced death or injury must have been unintentional." *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1085 (1st Cir.) (emphasis added), cert. denied, 498 U.S. 1013 (1990). A results approach focuses on the unexpected nature of the injury or death itself; thus, "where the death is not designed and not anticipated by the deceased, though it is in consequence of some act voluntarily done by him, it is accidental death." 10 Couch on insurance 2d §41:29, at 44 (rev. ed. 1982).

Under both approaches, however, an accident must be the proximate cause of the harm or loss.

> Irrespective of whether or not it is required that the means, as well as the result, be accidental in origin, it has been held that in determining whether or not a recovery will be allowed..... a court may require that the accident be a proximate cause of the injury or death, regardless of the fact that the policy may not set up this requirement.

1A Appleman, Insurance Law and Practice § 362, at 482 (rev. ed. 1981) (footnotes omitted) ; Couch on Insurance § 41:12, at 16 ("In order to bring the harm sustained within the coverage of an accident policy, it is necessary that the accident be the proximate cause of the harm sustained.") (footnote omitted).

We first note that the insurance policy in this case in fact requires that death be "caused by an accident." Second, the courts of both Illinois and Massachusetts have held that to obtain benefits under this kind of insurance, an accident must be the proximate cause of death or injury. See Carlson v. New York Life Ins. Co., 76 Ill. App. 2d 187, 196, 222 N.E.2d 363,

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[3] The district court, with the consent of the parties, applied Illinois and Massachusetts law to this insurance contract, finding that there was no difference between the law of the two jurisdictions.

368 (1966) (where there is both a preexisting illness and an accidental injury, "the pivotal issue is whether the accidental injury was the proximate cause of the resulting loss"); Coleman v. American Casualty Co., 354 Mass. 762, 762, 237 N.E.2d 22, 22 (1968) (where the insurance policy provides recovery for "loss resulting directly and independently of all other causes from accidental bodily injury," there must be evidence that but for the insured's accidental fall, the loss would not have occurred). Thus, the district court did not err in determining that Siguel must show that his father's death was precipitated by an accident.

This also takes care of Siguel's argument that for death to be accidental all that is required is that it be unexpected from the insured's point of view. While the results approach speaks of an unexpected and unforeseen result, there is no indication in the case law or commentaries that the unexpected nature of the loss is sufficient, without more, to trigger coverage. Indeed, Siguel does not cite any cases so holding. Wickman, on which Siguel primarily relies, is distinguishable. There the deceased was observed standing outside of a guardrail on an overpass section of an interstate highway. Immediately before the deceased fell to his death, he was holding on to the guardrail with only one hand.

To determine whether this death was accidental, we held that a fact finder must begin with the "reasonable expectations" of the insured. 908 F.2d at 1088. If there is insufficient evidence of the insured's point of view, the finder of fact then should then ask whether a reasonable person in the insured's position "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Id. Based on these principles, we upheld the magistrate's finding that the deceased knew or should have known that death was a likely consequence of his intentional act in standing on the outside of the guardrail and holding on with one hand. Id. at 1088-89.

It is obvious that the issue in Wickman was how to determine when the result of an intentional act is inadvertent. Focusing on the insured's expectations regarding the outcome of his or her behavior makes sense in this context. Here, though, there is no allegation that the insured's conduct

contributed in any way to his death. Thus, his expectations regarding when he would die are immaterial.

Siguel similarly argues that his father did not expect to die after having the abscess on his left arm drained. Thus, he asserts, when death unexpectedly occurs during a medical procedure, it should be viewed as accidental. However, where medical treatment is not sought for an accident, the "mere fact that the insured dies..... as a result of such treatment does not constitute an accident . . . . " Couch on Insurance § 41:113, at 187. There is no evidence that, first, the accident on the bus resulted in the abscess (the reason treatment was sought) or, second, that there was anything wrong with the way in which the draining procedure was performed.

Siguel next asserts that because his father did not expect to suffer cardiorespiratory failure, the illness itself was accidental. Siguel then posits that if the cardiorespiratory failure was an accident, his father's death was accidental. Siguel first set forth this theory in his motion for reconsideration filed after trial ended. In any event, Siguel again ignores the requirement of causation.

For example, in Scholle v. Continental Nat'l American Group, 44 Ill. App. 3d 716, 358 N.E.2d 893 (1976), the insured fell and subsequently died of a ruptured aneurysm. The court held that to recover, plaintiff was required to produce direct or circumstantial evidence to show that there was a "causal relationship" between the fall and the burst aneurysm. 44 Ill. App. 3d at 721, 358 N.E.2d at 897. Thus, "[w]here there is no occurrence which may be deemed an accident, it necessarily follows that the harm sustained as the consequence of a disease is not within the coverage of an accident policy." 10 Couch on Insurance § 41:70, at 105 (footnotes omitted).

Siguel finally avers that the district court erred by requiring expert medical testimony to link the accident on the bus, or the draining of the abscess, to his father's death. He argues that because the insurance contract did not require expert testimony, the court could not demand it. Siguel fails to cite any law in support of this proposition. Further, cases from both Illinois and Massachusetts reveal that experts routinely testify concerning this issue. See Wahls v. Aetna Life Ins. Co.,

122 Ill. App. 3d 309, 461 N.E.2d 466 (1983) ; Carlson v. New York Life Ins. Co., supra, 76 Ill. App. 2d 187, 222 N. E. 2d 363; Barnett v. John Hancock Mut. Li f e Ins. Co. , 304 Mass. 564, 24 N.E.2d 662 (1939) ; Wrobel v General Accident Fire & Life Assurance Corp. , 288 Mass. 206, 192 N. E. 498 (1934).

B. New Trial Motion

Siguel requested a new trial based on his assertion that the district court had misunderstood the law concerning accidental death insurance contracts and because Allstate had refused to turn over to Siguel the transcript of the deposition of Dr. Pinto, the physician who had investigated the claim for Allstate in Argentina. We review the denial of a motion for a new trial for abuse of discretion. deMars v. Equitable Life Assurance Soc'y of the United States, 610 F.2d 55, 64 (1st Cir. 1979).

Based on our discussion of the merits of Siguel's claim, we find that the court was fully justified in rejecting the motion for a new trial. As for the transcript of Dr. Pinto's deposition, we make only two observations. First, Siguel does not specify what information provided by Dr. Pinto would have helped him in establishing that the insured's death was accidental. Second, Siguel was present at the deposition and obtained a transcript of Dr. Pinto's testimony prior to the end of trial. Thus, there is no excuse for Siguel's failure so to specify.

C. Request for Admissions.

On March 28, 1991, Siguel filed the complaint in this case. At the same time, he served a request for admissions, interrogatories, and a request for documents. Allstate and Siguel agreed to extend the time for the filing of the answers to the interrogatories and the responses to the document request. Allstate states that it believed that the parties also had agreed to extend the time for it to answer the request for admissions. Siguel claims that the agreement never applied to the request for admissions. Therefore, on June 24, 1991, Allstate filed a motion to withdraw the matters deemed admitted by its failure to file timely responses and a motion to extend the time for responding to the admissions request. Siguel opposed the

motions and, on July 3, 1991, filed a motion for summary judgment based on the factual issues "admitted" by Allstate. On September 18, a magistrate judge granted Allstate's motions.

Fed. R. Civ. P. 36(a) provides that a matter is deemed admitted unless a response is filed "within 30 days after service of the request, or within such shorter or longer time as the court may allow . . . . " The district court may not only extend the time for filing answers to requests for admissions, but also may permit withdrawal of an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal . . . will prejudice that party in maintaining the action or defense on the merits." Fed. R. C iv. P. 3 6 (b) Contrary to Siguel's assertion, the focus under Rule 36(b) is not on the moving party's explanations for its non-compliance with the Rule. See F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994). Thus, Allstate is not required to show excusable neglect. -id. (citation omitted). We review a decision to allow withdrawal of admissions for abuse of discretion. Farr Man & Co. v. M/V Rozita, 903 F.2d 871, 876 (1st Cir. 1990).

The magistrate judge found that the matters deemed admitted were determinative of all the material facts in issue. As a result, "[t]he first half of the test is clearly satisfied since the effect of upholding the admissions would be to practically eliminate any presentation of the merits." Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192, 193 (D. Conn. 1976). We thus turn to whether Siguel satisfied his burden of demonstrating prejudice to his ability to maintain the action.

Siguel claims that Allstate's "delaying tactics" held up the proceedings and prevented him from conducting discovery for almost one year. Specifically, Siguel asserts that during this time he refrained from searching for witnesses who might have had knowledge concerning the circumstances of the insured's death. Siguel also complains that he was unable to conduct discovery prior to the district court's decision allowing withdrawal of the admissions because he did not know what facts were in dispute. These claims are unavailing. Siguel knew from the time Allstate denied coverage in 1989 that it

was alleging that his father's death was not an accident and that this would be the major issue in the case.

Further, prejudice under Rule 36(b) "relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." Brook Village N. Associates v. General Elec. Co., 686 F.2d 66, 70 (1st Cir.1982). There was no "sudden need" for Siguel to obtain evidence here. He was on notice as of June 24, 1991 that Allstate was attempting to withdraw its admissions. This was soon after the case was initiated and quite a while before a trial likely would occur. Finally, that Siguel filed a motion for summary judgment shortly after Allstate requested withdrawal of the admissions does not constitute prejudice. See F.D.I.C. v. Prusia, 18 F.3d at 640. Given our finding, we do not think that the district court erred in refusing to award costs to Siguel.

E. Assistance of Counsel.

Once the court granted Siguel leave to appear pro se, Siguel requested that he be allowed to hire counsel to assist him in trying the case. He argued that just as Allstate had hired local counsel, he too should be allowed the same opportunity. The court denied the motion, stating that it did not "permit a combination of a lawyer and a pro se." Siguel argues that by so holding, the court improperly created a new local rule. Siguel's claim lacks merit.

28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . . " Siguel admits that he could not find any cases in support of his interpretation of § 1654. The reason, we think, is plain. "Section 1654 does not itself confer any right to 'hybrid representation.'" O'Reilly v. New York Times Co., 692 F.2d 863, 868 (2d Cir. 1982) (to claim the right to self-representation, a party must "clearly and unequivocally discharge any lawyer"). Thus, the district court's denial of Siguel's request to employ a lawyer to aid him was not in error.

F. Costs and Sanctions.

Siguel appeals from the denial by the district court of a motion for sanctions (docket # 188) filed shortly before trial commenced. Siguel sought sanctions for Allstate's alleged (1) failure to comply with deadlines for filing pleadings and responding to discovery requests, (2) failure to prepare a joint stipulation concerning procedures for the taking of depositions in Argentina, (3) failure to file a joint statement of undisputed facts, (4) failure to prepare a list of documents it considered privileged, and (5) failure to serve subpoenas in compliance with Fed. R. Civ. P. 45. Siguel also claims that the district court erred in granting an extension of time to Allstate to file its answer to an amended complaint; Siguel asserts that the court granted this motion on the mistaken assumption that Siguel had not filed an opposition to an extension of time.

We have reviewed the record and the parties' briefs and cannot find that the district court abused the broad discretion it has in these areas. See In re Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1988) ("[t]rial courts enjoy a broad measure of discretion in managing pretrial affairs, including the conduct of discovery") . Consequently, " [w]e will intervene in such matters only upon a clear showing of manifest injustice, that is, where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party." Mack v. Great Atl. & Pac. Tea Co., 871 F. 2d 179, 186 (1st Cir. 1989) . Essentially, we agree with the district court's conclusion that Siguel failed to show how he was prejudiced by either the way in which the court managed the pretrial proceedings in this case or by Allstate's alleged failure to comply with the Federal Rules or court orders concerning discovery.

The judgment of the district court is affirmed.

APPENDIX B
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BERTA MAIDANIK SIGUEL,
Plaintiff,

v. CIVIL ACTION No. 91-10933-N

ALLSTATE LIFE INSURANCE CO.,
Defendant,

Order Re:
Defendant's Motion To Withdraw Admissions And For An *Extension* Of Time For Responding To Plaintiff's Request For Admissions
(Docket Entry # 7)

September 18, 1991

BOWLER, U.S.M.J.

Plaintiff Berta Maidanik Siguel brought this action against defendant Allstate Life Insurance Company for breach of contract and unfair trade practices. In 1986, plaintiff's son purchased an insurance policy from defendant, naming plaintiff's husband as the insured and plaintiff as the beneficiary. In February, 1988, plaintiff's husband died after receiving treatment for an injury sustained the previous month. Defendant denied plaintiff's claim for accidental death benefits under the policy, contending that the injury did not cause the insured's death. Plaintiff disputes this contention, and alleges that the denial was in breach of the insurance contract entered into by the parties, and that in the course of investigating the claim, defendant

committed unfair trade practices.

Background

On March 28, 1991, together with her complaint, plaintiff served defendant with interrogatories, a request for document production, and a request for admissions. Responses to the request for admissions were due on May 13, 1991. Defendant filed an acknowledgment of service (Docket Entry #6) on June 6, 1991, and filed its Motion to Withdraw Admissions and for an Extension of Time for Responding to Plaintiff's Request for Admissions (Docket Entry #7) on June 24, 1991.

Defendant contends that its failure to respond resulted from a miscommunication between the parties during negotiations to extend the deadline for responding to discovery. Defendant claims that plaintiff's failure to distinguish between discovery requests and the request for admissions led to the erroneous belief that plaintiff agreed to defendant's plan to request from this court an extension of time to respond to all three items served with the complaint.

Plaintiff, in her opposition, denies offering to extend the time for replying to the admissions, which she does not consider part of discovery. Plaintiff further alleges that defendant's failure to respond to the request for admissions is a delaying tactic that severely prejudices her ability to conduct discovery in Argentina, where the incident at issue occurred.

ANALYSIS

Fed. R. Civ. P. 36(a), which governs timeliness of response to requests for admissions, states that a matter is admitted if not responded to within 30 days after service, or "within such shorter or longer time as the court may allow.

Rule 36(b), which governs the effect of admission, states that the court may allow withdrawal of admission "when the presentation of the merits of the action will be subserved thereby, and the party who has obtained the admission fails to satisfy the court that withdrawal . . . will prejudice that

party in maintaining the action or defense on the merits."

Though unanswered requests are deemed admitted, courts interpret Rule 36(a) as granting them discretion to allow untimely answers. Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1312-1313 (8th Cir. 1982). A trial court's discretion is, however, bounded by the two point test put forth in Rule 36(b). Farr Man & Co., Inc. V. M/V Rozita, 903 F.2d 871, 876 (1st Cir. 1990); Brook Villiage North Associates v. General Electric-Co., 686 F.2d 66F 70, (1st Cir. 1982).[1]

The first consideration, that of the policy favoring resolution of cases upon their merits, is certainly implicated. The statements in plaintiff's first request for admissions are determinative of all of the facts at issue in this case. Denying withdrawal of the admissions would completely prevent presentation of the merits.

Plaintiff also fails to convince this court that she will be unduly prejudiced by withdrawal of defendant's admissions. Prejudice under Rule 36 refers not to the obtaining party's renewed task of presenting its case, but rather to "the difficulty a party may face in proving its case, e.g. caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." Brook Villiage North Associates, 686 F.2d *at* 70.

Plaintiff's claim that she relied upon defendant's admissions in preparing her case is premature. Plaintiff just recently received the first response to her request for document production, and has yet to depose any witnesses. Plaintiff will have ample opportunity to gather evidence in support of whatever issues defendant may choose to deny before the

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[1] Plaintiff's reliance upon Metpath v. Modern Medicine is misplaced. Metpath v. Modern Medicine simply holds that the District Court for the District of West Virginia did not abuse it's discretion in refusing to allow Modern Medicine, Inc. to withdraw its admissions. 1991 U.S. App Lexis 10796, No. 90-2234 (4th Cir. 1991). It is limited to its facts, and has minimal precedential value. Control of discovery remains committed to ,the sound discretion of this court. Id.,(citing Dukes v. South Carolina Ins. Co., 770 F.2d 545, 548-49 (5th Cir. 1985)).

case comes to trial.

Similarly, plaintiff's contention that she is prejudiced by her lost opportunity to conduct discovery in Argentina cannot be maintained. Plaintiff's inability to proceed was caused no more by defendant's two month delay in answering the admissions than by plaintiff's fourteen month delay in bringing the action, and by plaintiff's decision not to conduct discovery in Argentina in the fall of 1991. (See Docket Entry #11, Exh. b). While this court looks askance at delay tactics, it would be an abuse of discretion to deny the withdrawal as a discovery sanction without considering the test laid forth in Fed. R. Civ. P. 36. Gutting, 710 F.2d at 1313.

CONCLUSION

Defendant's Motion to Withdraw Admissions and for an Extension of Time for Responding to Plaintiff's Request for Admissions (Docket Entry #7) is **ALLOWED**. Defendant is **ORDERED** to respond to Plaintiff's Request For Admissions within fifteen (15) days from the date of issuance of this Order.

MARIANNE B. BOWLER /s/
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Berta Maidanik Siguel,
Plaintiff

v. Civil Action No. 91-10933X

ALLSTATE LIFE INSURANCE Co.
Defendant

MOTION TO RECONSIDER DISCOVERY DEADLINE

Plaintiff requests that the Court reconsider its discovery deadline and extend the period to end discovery.

As grounds therefore, plaintiff asserts as follows:

1. Allstate has yet to respond to many discovery requests long overdue. Without responses to interrogatories and document requests, it is impossible to determine what further evidence will be needed by Plaintiff to prove her case.

2. Plaintiff produced reports signed by the attending physician stating that the cause of death w accidental and otherwise complying with all the information provided by Allstate. Without further discovery responses by Allstate, it is impossible to determine what was insufficient or deficient about said physician report and the nature of the information required from further fact or expert witnesses.

3. The deadline imposed by the court to submit responses to all interrogatories from experts (approximately May 5, 1991) would require that the answers be prepared and signed no later than April, 1991. This timetable does not appear practical at this time given other pending discovery and the need specifically identify the facts required from experts. Plaintiff's counsel has been told by the U.S. Embassy in Buenos Aires to give two months notice to schedule an embassy official to take sworn testimony. It

is difficult to identify and interview an expert witness in Argentina between December and February, 1991. the time the expert is found, the issues are discussed, the questions are prepared and the U.S. embassy informed, the deadline for written answers would have passed.

4. Allstate has so far refused numerous requests (oral and in writing)',to stipulate how deposition are to be conducted in Argentina and the USA (i. e. , by telephone, translations who may take the oath,

5. Plaintiff asserts that the time which Allstate took to deny liability, over 18 months, is not a "reasonable time" and therefore violates Massachusetts and Illinois statutes that requires an insurance . . .

Hand Written Court Order on the first page of Siguel's motion:

November 19, 1991. Denied, after hearing. The parties are advised to reach an agreement as to the manner in which testimony will be obtained from witnesses in Argentina. A joint statement should be filed within 30 days setting forth with specificity the method jointly agreed upon.

Marianne B. Bowler U.S. Magistrate /s/

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BERTA MAIDANIK SIGUEL,
Plaintiff,

v. CIVIL ACTION No. 91-10933-K

ALLSTATE LIFE INSURANCE CO.,
Defendant.

ORDER RE:
DEFENDANT'S MOTION TO COMPEL DEPOSITION OF THE PLAINTIFF EITHER IN THE UNITED STATES OR IN ARGENTINA, WITH DEFENDANT'S COSTS AND ATTORNEYS FEES TO BE PAID BY PLAINTIFF, AND TO COMPEL SECOND DEPOSITION OF ENRIQUE OFMAN OR IN THE ALTERNATIVE TO PRECLUDE THE INTRODUCTION OF MR. OFMAN'S DEPOSITION TESTIMONY AT TRIAL (DOCKET ENTRY # 114); MOTION TO CLARIFY DISCOVERY DEADLINE IN REGARD TO ADMISSIONS (DOCKET ENTRY # 119); MOTION TO SUBSTITUTE PLAINTIFF OR APPROVE APPEAL ORDER OF CO-COUNSEL (DOCKET ENTRY # 123); PLAINTIFF'S MOTION TO COMPEL: REQUEST TO RECONSIDER (DOCKET ENTRY # 120); MOTION TO REINSTATE THE ADMISSIONS ADMITTED/STRIKE UNTIMELY RESPONSES (DOCKET ENTRY 137); DEFENDANT'S REQUEST FOR SANCTIONS (DOCKET ENTRY 148); MOTION FOR LEAVE TO SEEK DISCOVERY ON (SIC) COURT PRACTICES OF ALLSTATE AND ITS ATTORNEYS (DOCKET ENTRY # 140); DEFENDANT'S RENEWED MOTION TO DISQUALIFY EDWARD SIGUEL AS PLAINTIFF'S ATTORNEY (DOCKET ENTRY ## 74 & 105)

REPORT AND RECOMMENDATION

MOTION FOR SANCTIONS (DOCKET ENTRY # 129); DEFENDANT'S REQUEST FOR SANCTIONS (DOCKET ENTRY # 147); AND DEFENDANT'S REQUEST FOR SANCTIONS (DOCKET ENTRY # 148)

January 8, 1993

BOWLER, U.S.M.J.

On October 9 and 13, 1992, this court held a hearing concerning the above pending motions. At the conclusion of the hearing, this court took the motions (Docket Entry ## 74 & 105, 114, 119, 120, 123, 129, 137, 140 and 148) under advisement.

BACKGROUND

Plaintiff Berta Maidanik Siguel ("plaintiff") brought this action against defendant Allstate Life Insurance Company ("defendant") as a result of defendant's failure to honor an accidental death insurance policy issued on the life of plaintiff's deceased husband, Isidoro Siguel. The policy was in effect on February 10, 1988, the date of Isidoro Siguel's death. Plaintiff, who is also the mother of the attorney of record in this action, Edward N. Siguel ("Attorney Siguel"), is the beneficiary of the policy. (Docket Entry ## 31, 53 & 127).

Shortly before his death and as further elaborated in part III infra, Isidoro Siguel accidentally injured his arm while traveling by bus in Argentina, according to plaintiff. (Docket Entry # 31). The accidental death policy provides $200,000 for accidental injuries and/or death incurred by Isidoro Siguel while traveling on a common carrier. Between January 15 and February 9, 1988, Isidoro Siguel injured his arm while traveling on a "common carrier," i.e., a public bus in Argentina. As a result of his injury, Isidoro Siguel developed an infection in his arm which necessitated treatment. (Docket Entry # 31).

On February 10, 1988, Dr. Mauricio Pattin ("Dr. Pattin") treated Isidoro Siguel and drained an abscess in his arm at the Hospital Fernandez in Buenos Aires, Argentina. He died approximately three hours after receiving the treatment from Dr. Pattin. (Docket Entry # 31).

The cause of Isidoro Siguel's death is hotly disputed. Plaintiff maintains that Isidoro Siguel died as a result of the

accidental injury to his arm incurred while traveling on a common carrier and, consequently, his death is covered under the policy. Defendant denies these allegations, claims Isidoro Siguel's death was not caused by his alleged injury on a common carrier, and refuses to pay benefits.[1]

Plaintiff seeks to recover monies from defendant for: (1) breach of contract; (2) misrepresentation; and (3) violation of Massachusetts General Laws chapter 93A ("chapter 93A"). (Docket Entry ## 31 & 127).

I. MOTION TO CLARIFY DISCOVERY DEADLINE IN REGARD TO ADMISSIONS (DOCKET ENTRY # 119); MOTION FOR SANCTIONS (DOCKET ENTRY # 129)

On August 18, 1992, plaintiff filed a motion to clarify this court's discovery deadline of June 30, 1992. (Docket Entry 119). At the hearing on October 13, 1992, this court indicated its intention to revise the discovery deadline upon issuance of this Order.[2]

Plaintiff's motion to clarify (Docket Entry # 119) seeks to determine whether she can serve request for admissions after the close of discovery. Defendant opposes the motion and seeks to preclude plaintiff from issuing additional request for admissions. (Docket Entry # 129).

Defendant argues that plaintiff utilizes request for admissions as a means to increase litigation costs. Defendant claims that an age discrimination case brought by Attorney Siguel (Siguel v. Trustees of Tufts College, Civil Action No. 89-227-Y), wherein the docket exceeds 700 entries, typifies Attorney Siguel's manner of conducting litigation. Defendant additionally seeks reimbursement from plaintiff for the reasonable cost of opposing plaintiff's motion to clarify (Docket Entry 119) under Rule 11 ("Rule 11"), Fed. R. Civ. P. (Docket Entry 129).

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[1] By letter, a claims analyst advises plaintiff that the Death Certificate lists "Cardia-Respiratory Arrest" as the cause of death and states "(t]here is no evidence that an accident in any way contributed" to Isidoro Siguel's death. (Docket Entry 70, Ex. C).

[2] As stated infra, discovery is extended up to and including March 22, 1993.

The purpose of request for admissions is to narrow issues by removing undisputed issues of fact. Diederich v. Department of Army, 132 F.R.D. 614, 616 (S.D.N.Y. 1990); Kershner v. Beloit Corporation, 106 F.R.D. 498, 499 (D.Me. 1985). Unlike interrogatories or depositions, it is generally improper to use request for admissions as "discovery device(s)." Dubin v. E.F.Hutton Group, Inc., 125 F.R.D. 372, 375 (S.D.N.Y. 1989); cf. Board of Education of Evanston Township High School District No. 202 v. Admiral Heating and Ventilating, Inc., 104 F.R.D. 23 (N.D.I11. 1984) (discussing distinction between admissions and interrogatories).

Consequently, it is the usual practice of this court to exclude admissions from a discovery deadline. Plaintiff may therefore file request for admissions after the March 22, 1993, close of discovery.

It nevertheless appears to this court that plaintiff, through Attorney Siguel, at times employs request for admissions as a means to conduct discovery. It is worth noting that plaintiff served her first request for 65 admissions at the outset of discovery. Plaintiff is strongly advised not to employ request for admissions in an indiscriminate manner in the future.

Language contained in Reinauer Oil Transport, Inc., 19 F.R.D. 5 (D.Mass. 1956), is particularly instructive. Therein, the court stated that Rule 36:

> should be used to obtain admission of facts about which there is no real dispute. They should deal with singularly relevant facts which can be clearly admitted or denied and not with complicated situations involving many distinct and vital controversial issues of fact. They should not be used as a means of covering the entire case and every item of evidence.

Id. at 5.

Turning to defendant's request for Rule 11 sanctions, this court is well aware of the difficulties imposed upon defendant by this litigation, including conducting depositions in Argentina. The central purpose of Rule 11 is to deter baseless filings and to streamline federal court procedure. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 2454 (1990); Cruz v. Savage, 896 F.2d 626, 630 (1st Cir. 1990). To

achieve these goals, Rule 11 requires attorneys to take responsibility for the claims and defenses they present. Cruz v. Savage, 896 F.2d at 630.

Under Rule 11, attorneys have a duty to investigate their clients' claims before filing a motion or other paper with the court and to reassess these claims throughout the litigation. Kale v. Combine Insurance Co. of America, 861 F.2d 746, 758 (1st Cir. 1988). Rule 11 obligates attorneys to certify that they conducted a reasonable inquiry and determined that any filings are well grounded in fact and law and are not interposed for an improper purpose.

It is well settled that the court applies an objective standard to determine whether a party and his counsel have responsibly initiated and/or litigated a cause of action. Ballards Service Center, Inc. v. Transue, 865 F.2d 447, 449 (1st Cir. 1989). The objective standard governing the imposition of Rule 11 sanctions is "reasonableness under the circumstances." Kale v. Combined Insurance Co. of America, 861 F.2d at 757. In gauging an attorney's conduct under this objective standard and in deciding whether to impose Rule 11 sanctions, the court should exercise caution. Cruz v. Savage, 869 F.2d at 630. The court should evaluate an attorney's conduct based upon "what was reasonable at the time the attorney acted," and should not impose sanctions if the effect is to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Id.; accord Lancelloti v. Honorable Thomas F. Fay, 909 F.2d 15, 19 (1st 1990).

In the two page motion to clarify (Docket Entry # 119), plaintiff explains that the case law "is confusing" and that he conducted legal research in this area and was unable to determine whether request for admissions fell outside a court imposed discovery deadline. At the time Attorney Siguel filed the motion to clarify, it is apparent that he conducted a reasonable investigation, albeit without avail.

It is therefore **RECOMMENDED**[3] that defendant's motion for Rule 11 sanctions (Docket Entry # 129) be **DENIED**.

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[3] Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten-days of receipt of-the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten

Plaintiff's motion to clarify (Docket Entry # 119) is **ALLOWED**. Request for admissions fall outside the parameters of the March 22, 1993, discovery deadline and shall be served on an opposing party no later than 30 days after the March 22, 1993, close of discovery.

II. MOTION TO REINSTATE THE ADMISSIONS ADMITTED/STRIKE UNTIMELY RESPONSES (DOCKET ENTRY # 137); DEFENDANT'S REQUEST FOR SANCTIONS (DOCKET ENTRY # 147)

On September 15, 1992, plaintiff filed a motion to reinstate or deem admitted certain request for admissions previously ruled on and denied by this court on September 18, 1991 (Docket Entry 38). (Docket Entry # 137). The Order of September 18, 1991, allowed defendant an extension of 15 days time within which to file responses to plaintiff's first request for admissions. Defendant objects to the motion to reinstate and moves for sanctions on the basis of Rule 11. (Docket Entry # 147).

Defendant's responses to plaintiff's first request for admissions were due on May 13, 1991. Attorney Siguel avers that "the late admission responses I received by Allstate were confusing, contradictory and evasive." (Docket Entry # 139, 14). He maintains that if he had received timely responses, he could have filed a motion to determine their sufficiency. (Docket Entry # 139, 1 15).

By affidavit, Attorney Siguel states that, in reliance upon defendant's admissions, he decided not to locate certain witnesses while in Argentina in September 1991. (Docket Entry 139, 11 18). He contends that he did not know what discovery was needed because of defendant's delay in responding to the request for admissions. Plaintiff points out that it was not until September 1991 that this court ruled on defendant's motion for an extension with respect to the first request for admissions (Docket Entry # 7). (Docket Entry # 139, 1 15). Consequently, plaintiff's litigation costs increased

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days after service of the objections. Failure to file objections within the specified time waives the right to appeal the district court's order. United States v. Escoboza Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir.1986).

thereby resulting in prejudice to plaintiff. (Docket Entry ## 137-139).

Plaintiff principally relies on Rule 6(b)(2), Fed. R. Civ. P., as a basis to reinstate the admissions.[4] She argues that defendant's failure to move for an extension of time until after May 13, 1991, was not the result of "excusable neglect-" Rule 6(b)(2), Fed. R. Civ. P.

As noted in this court's Order of September 18, 1991, defendant maintains that its delay resulted from a misunderstanding during communications between opposing counsel. Defendant apparently misunderstood that a discovery extension would not cover request for admissions. Such a misunderstanding appears reasonable, despite plaintiff's allegations to the contrary, and sufficiently establishes excusable neglect.

Nor is this court persuaded by plaintiff's allegations of prejudice. Plaintiff brought this lawsuit and should generally bear the cost of investigating her claims. Her decision to forego investigative work in reliance on defendant's failure to respond to the first request for admissions fails to provide adequate grounds for this court to reinstate the admissions.

Turning to defendant's request for Rule 11 sanctions, defendant complains that it was not until one year after this court's ruling that plaintiff sought to reinstate the admissions. The September 18, 1991, Order, however, did not expressly address Rule 6(b)(2), Fed. R. Civ. P. In addition, factual circumstances changed after the ruling which, plaintiff reasonably believed, further buttressed her claim of prejudice. Although the issue is close, this court finds plaintiff's conduct in filing the motion objectively reasonable at the time thereby precluding Rule 11 sanctions.

Plaintiff's motion to reinstate (Docket Entry # 137) is **DENIED**. It is **RECOMMENDED**[5] that defendant's request for Rule 11 sanctions (Docket Entry # 147) be **DENIED**.

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[4] A review of plaintiff's original opposition (Docket Entry # 11) indicates she did not raise her "excusable neglect" argument under Rule 6(b)(2) in her original pleading.

[5] See footnote number 3.

APPENDIX E
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BERTA MAIDANIK SIGUEL,
Plaintiff,

v. CIVIL ACTION No. 91-10933-K

ALLSTATE LIFE INSURANCE CO.,
Defendant.

Memorandum and order
May 7 1993

Before the court are Order and Report and Recommendation (of Magistrate Judge Bowler), (Docket No. 153, dated January 8, 1993), objections and related documents filed by plaintiff (Docket No. L54 filed January 13, 1993, Docket Nos. 156 and 157 filed January 20, 1993, and Docket No. 161 filed February 4, 1993), and objections and related documents filed by defendant (Docket No. 158 filed January 22, 1993, and Docket No. 160 filed January 29, 1993).

I. Standard of Review.

The function of the district court in determining objections to a magistrate judge's ruling is defined by statute:

> Notwithstanding any provision of law to the contrary (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon

which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept,,. reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. §636(b)(1).

The district judge is guided also by applicable provisions of the Federal Rules of civil Procedure.

Rule 72. Magistrates, Pretrial Matters

(a) **Nondispositive Matters**. Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the

magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(b) **Dispositive Motions and Prisoner Petitions.** The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to ail parties.

. . . Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written, objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Fed. R. Civ. P. 72.

Additional relevant provisions appear in Rules for United States Magistrates in the United States District Court for the District of Massachusetts, Rules 2 (on nondispositive matters) and 3 (on dispositive matters).

Under the applicable provisions in the statute and rules, a judge of the court, upon timely objection or motion, must reconsider a magistrate's order on nondispositive pretrial matters within the jurisdiction of the magistrate and "set aside any portion [of the order] found to be clearly erroneous in fact or contrary to law." Local Magistrates Rule 2(b); cf. 28 U.S.C. §636(b) (1) (A) ("clearly erroneous or contrary to

law") ; Fed. R. Civ. P. 72(a) ("clearly erroneous or contrary to law").

Also, a party seeking reconsideration by the court of a magistrate judge's order on a nondispositive pretrial matter must specifically designate the order or part thereof to be reconsidered and the basis for objection thereto.

Local Magistrates Rule 2(b).

If the decision to be made by the judicial officer in relation to a nondispositive matter involves an exercise of discretion, the district court may modify or reverse the magistrate judge's order upon a determination of abuse of discretion, but not otherwise unless the magistrate judge's order was based on an error of law or a clearly erroneous finding of fact. See, e.g., Geophysical Systems Corp. v. Raytheon, 117 F.R.D. 646, 647 (C.D. Cal. 1987) (applying abuse of discretion standard in reviewing a magistrate's nondispositive pre-trial orders, noting "More precise evidentiary rulings should await trial, when the issues are more clearly defined.,... At this juncture, the [c]ourt must review the magistrate's order with an eye toward the broad standard of relevance in the discovery context.").

It is my practice to adhere strictly to these limitations on the scope of review of a magistrate judge's order and not to engage in de novo consideration of nondispositive pretrial matters. As explained more fully below, some of the motions and objections recently filed by the parties in this case appear to request a departure from this practice. That request is denied, and for the reasons explained below, all requests for modification of the magistrate judge's order are denied.

III. Requests for Admission After Discovery Deadline

Plaintiff's submission filed by new counsel on her behalf on January 20, 1993 (Docket No. 156) requests modification of the magistrate judge's ruling with respect to requests for admissions filed by plaintiff after the discovery deadline. Plaintiff states:

Although we do not object to the Magistrate's decision allowing admission requests after the discovery deadline, and we do not object to the deadline established by the Magistrate for admission requests, we respectfully request that the U.S. District Judge modify the Magistrate's interpretation in the order and report, at p. 5, of what constitutes a valid admission under Fed. R. Civ. P. 36.

The magistrate judge ruled that plaintiff may file requests for admissions after the discovery deadline but also, after noting that plaintiff had "served her first request of 65 admissions at the outset of discovery," cautioned that plaintiff "is strongly advised not to employ requests for admissions in an indiscriminate manner in the future." order and Report at 5.

In essence, plaintiff now requests that this court rewrite the magistrate judge's reasoned discussion of precedents in which she explained her reasons for the order. The court rejects that request and instead adheres to the standard of review explained in Part I of this Memorandum. Applying this standard, I conclude that this order is neither erroneous in law nor an abuse of discretion.

IV. Motion to Reinstate Admissions

Plaintiff objects to the magistrate judge's denial of plaintiff's motion to reinstate an order deeming certain matters admitted because of defendant's failure to file a timely response.

Plaintiff has utterly failed to show that the magistrate judge's reconsidered order was based on an error of law or an erroneous finding of fact, or that it was an abuse of discretion. In effect, plaintiff is simply asking this court to review the matter de novo and reach a different decision on a matter committed to the discretion of the magistrate judge. The request is denied.

/s/ Judge Keeton
United States District Judge

APPENDIX F
Excerpts from Trial Transcript
Opinions of the Court, J. Keeton

THE COURT: Let me make another suggestion. Let me ask you whether I think I have heard your arguments. Basically I understand what you're going to argue to me. My suggestion would be that I now state my findings and conclusions and then give you an opportunity to move for any modification of them. Is that perhaps a better way of proceeding?

[Clarifying note by appellant: Siguel requested that the parties prepare a brief before the Court]

MR. SIGUEL: That's agreeable your Honor.

MR. BROWNE: Yes, your Honor.

THE COURT: All right. I'll do it, then so now I am proceeding under Rule 52(c), and first I want to identify the contentions as to what the accident was and my findings that bear upon that. And you will understand, of course, that I am making my findings by a preponderance of the evidence considering only the plaintiff's evidence. I have not yet received all of the defendant's evidence, so of course, should I come out with a finding here that the plaintiff has made enough of a showing to survive this motion, then we go on to the defendant's case. So I am making my evaluations of the evidence on the basis of considering the plaintiff's evidence only.

On that basis, Exhibit 16 having been received in evidence, I find that the plaintiff has shown by a preponderance of the evidence that an accident occurred on a 25 bus in which the decedent suffered a blow to his left forearm while getting off of a public transportation vehicle. The fact that the particular time and place is not identified is not fatal to the plaintiff's claim, so I am assuming, then, for the remainder of my findings and conclusions in relation to this case that the plaintiff has established that an accident did occur on the bus.

The remaining issue with respect to a claim for recovery on that theory is: has the plaintiff shown by a preponderance of the evidence that that accident was a cause of the decedent's death, and I find that the plaintiff has not met the burden of proving by a preponderance of the evidence that that accident was a cause of the decedent's death.

Now, in making that finding, I have determined that it is unnecessary for me to address in very precise terms exactly what is the meaning of the contractual provision in this contract. I accept as an assumption for this purpose that the courts in both Massachusetts and Illinois have to some extent adopted a meaning of clauses of this kind that is more favorable to a plaintiff, to a claimant, than a literal interpretation of the terms of this policy would be, but that even under that more favorable interpretation the plaintiff's evidence in this case is not sufficient to support a finding by a preponderance of the evidence that there is a causal link between accident as defined more broadly than a literal interpretation of the policy provisions would provide and the death in this instance.

I explain further a part of the problem of inadequacy of the proof. Whether or not there is a causal link between an accident such as having a blow to the forearm in some manner while leaving a public transportation bus and death that occurs sometime later, some days later, not exactly specified because the exact length of time between the incident on the bus and the death is not clear, but it is not material here, the existence of that causal link is not a matter that can be proved or can be inferred by a fact finder without the assistance of medical expert testimony; that is, the processes of impact upon the body and what that does to various parts of the human body and how that might function to produce an abscess if there was a connection between those two and how that abscess in turn might function to produce death. Those are matters that are not matters of lay understanding and knowledge and under the clearly

established precedents in both Massachusetts and Illinois, some expert testimony is required to assist the fact finder to support plaintiff's claim and enable the fact finder to find by a preponderance of the evidence that there is that causal connection.

Now, when I turn to the question whether expect testimony has been presented to me in this case that would support that finding, I do have an expression of opinion in Exhibit 16 which has been received in evidence without limitation. And give me just a moment. I want to quote precisely in the record what I'm referring to.

Quote: 'It is my opinion that the patient was in his usual state of good health prior to his accident. The accident caused the injury to his arm which then became infected and caused a deterioration of the health of the patient and then his death,' unquote. That's the central expression. There are other parts of Exhibit 16 that elaborate upon that. Now that's in evidence before me. What I must now do as fact finder is determine whether I should credit that expression of opinion and find on the basis of that expression of opinion by a preponderance of the evidence, looking only at the evidence that's offered by the plaintiff at this point since I'm doing it under Rule 52(c), that the death of Isidoro Siguel was caused by the accident on the public transportation vehicle. I find that I cannot credit that opinion for the following reasons. It is what I have referred to earlier in our expressions as a black box opinion. That is, it does not explain to me any reasoned basis on which either the expert or I as fact finder could draw the inference that more probably than not the abscess referred to here was caused by the accident, whatever blow to the forearm occurred in the accident, and that in turn that abscess caused the death. There are two serious absences of any reasoned basis in evidence to support that finding.

First is the absence of a reasoned basis to explain why the blow would cause or did cause this abscess, and second, any reasoned basis for explaining why the abscess in turn caused the death, and of course we cannot make the link

between the blow and the death unless we can make it through the abscess. There is simply no reasoned explanation of that.

And quite apart from whether the Daubert opinion of the Supreme Court of the United States makes that kind of opinion inadmissible, I do not find that kind of unexplained, unreasoned opinion persuasive to me as a fact finder. So I am also saying to you that to the extent that the additional opinion proffered in Exhibit 60 to which I have sustained an objection might be argued as supporting a finding contrary to the one I am making, there are two problems about it.

Number one, it too is a black box opinion, unexplained and, as I have ruled, it's inadmissible, but I am also addressing the question now: even if I received that in evidence and had it before me along with Exhibit 16 as the basis for my making fact findings now, I make the same fact finding, that these two opinions together do not persuade me by a preponderance of the evidence that there is a causal connection between the bus accident and the abscess, first step, and then between the abscess and the death, second step. Neither one of those is explained on a reasoned basis. And so even if I am in error in ruling as I have done in excluding Exhibit 60, still I have to reach the same finding when I act as fact finder, because adding Exhibit 60 and the opinion in paragraph 25 of it to the evidence before me still does not give me a basis on which I could reasonably find as fact finder, and I do not find as fact finder on that basis, that the plaintiff has met the burden of showing by a preponderance of the evidence that there is a causal connection between the accident on the bus and the death.

Now I address separately the plaintiff's alternative theory that there was somehow an accident in the medical treatment, the draining of the abscess, which accident caused the death.

Now, as fact finder, my first problem in thinking about this contention is that no accident is identified for me. There is not any identification in the evidence before me

of anything that was done wrong in the medical procedure which might be thought of as an accident from the perspective of the patient, nor is there anything identified for me in the evidence of any identified event of any kind that was accidental. Instead, the plaintiff is asserting in effect that because death does not ordinarily follow from a medical procedure such as draining an abscess, I should draw the inference that the death was accidental, that it resulted from an accident. That is not persuasive as a factual assertion. I cannot as a fact finder draw that inference, and I cannot as a fact finder draw it in part because I need some expert testimony to help me. This is not a matter that's within ordinary lay knowledge.

This is not, for example, like a patient ending up after an operation with a sponge inside. We let the lay fact finder draw that inference that that was a result of medical negligence and might arguably at least be an accident for the purpose of a policy such as this. That's another question that is more debatable but I don't need to address it, because even if we looked at it that way, this is not like a sponge ending up in a patient after an operation. This is simply a medical procedure a rather common radical procedure, followed by the patient moving into a condition of shock described in various ways as different possibilities and from that into death, and there is no part of that sequence that is identified for me as an accident.

Now I understand the plaintiff's contention that since death was unexpected it must be accidental. That is a contention that I reject as a matter of law. That is, that is not a correct legal theory. So though I accept the fact that neither the plaintiff nor those treating him expected that death would result as soon as it did at the time that it did, that does not meet the burden of proof that the plaintiff has to show (A) some kind of accident and (B) some kind of causal connection between that accident and the death.

So as to the alternative theory that the plaintiff proposes,

that there was some accident in the course of the medical treatment, it fails, I find, for two reasons. I find that the plaintiff's evidence is not persuasive and I cannot find by a preponderance of the evidence what accident there was. And secondly, even if I assume that there was some accident unidentified precisely, I cannot find that there was any causal connection between that accident and the death.

Now, because the plaintiff has the burden of proof of showing that there was an accident and that the accident was a cause of death and the plaintiff has failed to offer evidence on the basis of which I as fact finder would find by a preponderance of the evidence that both of those points have been proved, then I find that the plaintiff has failed to meet his burden of proof. And as fact finder, then, I come to the decision that there is a key element of every theory that the plaintiff is asserting for recovery under the contract that is fatal to any claim regardless of plaintiff's success in meeting whatever other issues there are in the case, and for that reason I direct that the clerk enter final judgment for the defendant on the contract claim.

APPENDIX G
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD SIGUEL,
Plaintiff

v. CIVIL ACTION NO. 91-10933-K

ALLSTATE LIFE INSURANCE COMPANY,
Defendant

Final Judgment

January 27, 1994

This case having come to trial before the court without a jury, and the plaintiff having been fully heard, in accordance with Rule 52 (c) of the Federal Rules of Civil Procedure, with respect to the issues as to whether plaintiff had proved by a preponderance of the evidence that Isidoro Siguel suffered an accident that resulted in his death, and the court having found that plaintiff has not proved by a preponderance of the evidence that Isidoro Siguel suffered an accident that resulted in his death, and this finding having been announced, and the parties having stipulated that all remaining claims should be dismissed but on condition that they may be asserted again at new trial if a higher court determines that a new trial should be granted in this case, it is ORDERED:

Judgment for defendant on the contract claim against defendant. All other claims of plaintiff are dismissed in accordance with the stipulation of the parties.

Costs are awarded to defendant

/s/ Robert E. Keeton
United States District Judge

APPENDIX H
United States Court of Appeals
For the First Circuit

No. 94-1392

BERTA MAIDANIK SIGUEL AND EDWARD N. SIGUEL,

Plaintiffs, Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before
Torruella, Chief Judge,
Selya and Boudin, Circuit Judges.

ORDER OF COURT
Entered April 5, 1995

The petition for reconsideration is denied.

By the Court:

Francis P. Scigliano, Clerk

By: /s/
Chief Deputy Clerk.

APPENDIX I
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD SIGUEL,
Plaintiff

v. CIVIL ACTION NO. 91-10933-K

ALLSTATE LIFE INSURANCE COMPANY,
Defendant

Memorandum and Order
March 9, 1994

On findings and conclusions stated orally in court on January 27, 1994, and in accordance with the order of the court at that time, the Clerk entered Final Judgment in this case on February 1, 1994, as follows:

> Judgment for defendant on the contract claim against defendant. All other claims of plaintiff are dismissed in accordance with the stipulation of the parties.
>
> Costs are awarded to defendant.
>
> Docket No. 220.

Now before the court is Plaintiff's Motion for New Trial or Reconsideration of Judgment or to Amend Findings (Docket No. 221, filed February 10, 1994), together with supporting (Docket Nos. 222, 223, 225, 226) and opposing (Docket No. 224) submissions.

The arguments presented in the motion and supporting submissions are in essence basically the same arguments as those fully heard and considered during trial. They must be rejected for the reasons stated in the

court's findings and conclusions stated orally in open court on January 27, 1994.

Insofar as plaintiff seeks to introduce new evidence by affidavit (Docket Nos. 223, 226), his effort fails for two independent reasons: First, no cause is shown for reopening the record to allow additional evidence. Second, even if those parts of the affidavits that are admissible were taken into account, they would not lead to any modification of the court's findings of fact.

Because the plaintiff's submissions are generously interlaced with plaintiff's characterizations of the court's rulings rather than accurate recitations of the court's actual findings and conclusions, I note explicitly that my findings and conclusions are as stated on the record by me on January 27, 1994, and are not correctly described by the plaintiff's post-trial submissions.

ORDER

For the foregoing reasons, it is ORDERED:

The Clerk will enter on a separate document, in accordance with Federal Rule of Civil Procedure 58, a Final Order as follows:

Plaintiff's Motion for New Trial or Reconsideration of Judgment or to Amend Findings (Docket No. 221) is denied.

/s/ Robert E. Keeton
United States District Judge

APPENDIX J

Dates responses due, responses served, Events

Response Due/Date	Response Date	Events
4/20/91	10/25/91	Complaint filed and served 3/28/91
	4/16/91	Allstate requests ext. of time to respond to complaint
5/15/91	6/24/91 7/18/91	Allstate requests 30 day ext. time to respond to adm. 1st Request for Admissions filed & served 3/28/91.
5/15/ 91	7/11/91	1st set of document requests, partial response.
5/15/91	7/17/91 - 3/30/92	Allstate's partial responses to 1st set of Interrogatories.
	5/2/91	Allstate's motion to Strike paragraphs of complaint
	June/91	Allstate refuses to promptly respond to admissions, interrog., doc. requests. Allstate ends negotiations on its responses to discovery. Allstate refuses to stipulate procedures for depositions in Argentina.
7/ 3/91		Plaintiff's motion for Summary Judgment based on admitted admissions.
8/ 2/91	8/15/91	2nd request for production of documents from Allstate.
8/ 2/91	8/26/91	2nd set of interrogatories from Allstate.
9/18/91		Court allows Allstate's motion to extend time to respond to Admissions.

10/25/91		Court decides on Motion to Strike, orders answer within 10 days. 10/15/91
11/7/91		Plaintiff requests extension of discovery deadline. Denied.
12/22/91	1/92	Received by mail after due date. Allstate serves objections to 3rd request for documents.
12/30/91	About 12/30/91.	On 11/19/91, Court orders parties to file joint procedures for discovery in Argentina within 30 days. Plaintiff files proposed procedures for discovery in Argentina. Allstate refuses to meet/discuss procedures before deadline.
3/ 4/92	3/ 4/92	2/4/92. Court orders joint procedures for discovery in Argentina (2nd time).
2/92	3/30/92	Allstate schedules deposition of employee Brewer.
	9/10/92	Allstate's answers to Amended complaint filed 4/4/92. Includes MGLc.93A letters as exhibits (2).
April 12-17, 1992		Week agreed upon for depositions in Argentina..
6/30/92		On 10/29/91, Court issues Rule 16 pretrial plan, discovery deadline June 30, 1992.
2/93	Not done	1/93. Court orders Allstate to prepare list of privileged documents, respond to document requests, interrogatories. Allstate does not respond.

Notes. Dates refer to the date a document was served, mailed, filed or received or it was due. There may be a few days difference (due to mailing) between the date a document was signed, served or mailed, filed and received.

APPENDIX K
U.S. District Court - Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 91-CV-10933
(Excerpts)

Siguel, et al v. Allstate Life Insur Filed: 03/28/91
Assigned to: Judge Robert E. Keeton
Jury demand: Both
Demand: $0,000 Nature of Suit: 110
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1332 Diversity-Insurance Contract

3/28/91	1	Complaint filed (bdb)
5/2/91	3	Motion by Allstate Life Insur to strike [1-1]allegations from the complaint , filed.c/s. (mm) (Entry date 05/13/91)
5/8/91	4	Response by Berta Maidanik Siguel in opposition to [3-11 motion to strike [1-1]allegations from the complaint, filed, cls. (mm) [Entry date 05/13/91)
6/24/91	7	Motion by Allstate Life Insur to withdraw admissions and for an extension of time for responding to plaintiff's request for admissions to Magistrate Marianne B. Bowler, filed. cls. (mm) [Entry date 06/25/91]
7/3/91	11	Response by Berta Maidanik Siguel in opposition to [7-1] motion to withdraw admissions, (7-2] motion for an extension of time for responding to plaintiff's request for admissions , filed, c/s. (mm) [Entry date 07/09/91]
7/3/91	12	Motion by Berta Maidanik Siguel to compel Allstate' response to the first request for production of documents and interrogatories to Magistrate Marianne B. Bowler, filed. cls. (mm) (Entry date 07/09/911
7/11/91	16	Response by Allstate Life Insur in opposition to [12-1] motion to compel Allstate' response

to the first request for production of documents and interrogatories filed. cls. (mm) [Entry date 07/16/91]

7/17/91 21 Motion by Allstate Life Insur for leave to file reply brief in response to plaintiff's opposition to defendant's motion to withdraw admissions and for an extension of time to respond to Magistrate Marianne B. Bowler, filed. c/s (mm) [Entry date 07/23/91]

7/19/91 17 Judge David S. Nelson . Civil Order of Reference: Case referred to Magistrate Marianne B. Bowler for rule 16(b)

7/31/91 25 Letter to the court from Edward N. Siguel: Allstate has filed several documents in court which have not been served upon plaintiff's counsel. filed. (mm) [Entry date 08/05/911

9/18/91 38 Magistrate Marianne B. Bowler . Order granting (7-1] motion to withdraw admissions and [7-2] motion for an extension of time for responding to plaintiff's request for admissions. Defendant is ORDERED to respond to plaintiff's request for admissions within fifteen days from the date of issuance of this order, entered. (mm) [Entry date 09/20/91]

9/24/91 45 Motion by Berta Maidanik Siguel to compel Allstate's response to the second request for production of documents and interrogatories to Magistrate Marianne B. Bowler filed. cls (mm) [Entry date 09/25/91]

10/3/91 48 Certificate of service by Allstate Life Insur of response to plaintiff's first request for admissions, filed. (mm) [Entry date 10/04/91]

10/28/91 55 Magistrate Marianne B. Bowler Clerk's Notes:P states that his lst mtn for request for prod. of docs. [131 is still outstading. D's objection is not yet filed. D's object to p's mtn [13] due to be filed w/the ct. one week from today. Schedule for discovery set. P request one year, D request four months. Discovery to close on 6/30/92. F.D.C. set for 6/30/92 at 10:00am, , Motion hearing before Magistrate Marianne B. Bowler set for 10:15 11/19/91 for motion to compel Allstate' response to the first request for production of

documents and interrogatories filed. (mm) [Entry date 11/01/911

11/5/91 57 Response by Allstate Life Insur in opposition to [45-1] motion to compel Allstate's response to the second request for production of documents and interrogatories filed, cls (mm) [Entry date 11/06/911

11/8/91 - Case reassign to Judge Robert E. Keeton due to Judge Nelson's transfer to senior status as of October 10, 1991. Notice of transfer sent to counsel. (fbd)
[Entry date 11/13/91]

11/8/91 58 Motion by Berta Maidanik Siguel for reconsideration of discovery deadline to Magistrate Marianne B. Bowler filed. c/s. (mm) [Entry date 11/13/91]

11/8/91 59 Motion by Berta Maidanik Siguel to compel Allstate to respond to specific interrogatories and document requests, set I to Magistrate Marianne B. Bowler filed. c/s. (mm) [Entry date 11/13/91]

11/19/91 Magistrate Marianne B. Bowler Endorsed order denying [58-1] motion for reconsideration of discovery deadline (wam) [Entry date 11/22/91]

12/20/91 61 Statement of proposed procedures for depositions in Argentina by Berta Maidanik Siguel, filed. (mm) [Entry date 12/31/91]

1/2/92 64 Response of D to P's statement on proposed procedures for depo, in Argentina, filed (tap) [Entry date 01/06/921

2/4/92 71 Magistrate/judge Marianne B. Bowler . Clerk's Notes: Hearing held on P's mtn re: depo procedures. D to file mtn to disqualify P's cl w/in 14 days. Depos in Argentina to be conducted between 3/29/92 -4/23/92. P to identify expert by 2/26/92. C1 to agree as to retaining a stenographer. Interpreter will have to be retained. Within 30 days lc to file a jtn stip of depo procedures by 3/4/.,set status conference for 11:15 3/10/92 (tap) (Entry date 02/06/92]
[Entry date 02/11/92]

3/3/92 77 Plaintiff's statement on proposed procedures for depositions in Argentina FILED c/s (wam) (Entry date 03/10/92]

3/9/92 80 Joint Stipulation To Procedures For Depositions In Argentina FILED (wam) [Entry date 03/17/92]

3/9/92 81 Plaintiff's Supplemental Statement To Joint Stipulation To Procedures For Depositions In Argentina FILED c/s (wam) (Entry date 03/17/92]

3/9/92 82 Motion by Berta Maidanik Siguel to compel Allstate' responses to objected document requests and interrogatories FILED (wam) [Entry date 03/17/92]

3/10/92 -- Status conference held to discuss depo. arrangements for Argentina. (sad) [Entry date 03/20/92]

6/23/92 97 Proposed Statement of Facts by Berta Maidanik Siguel FILED (wam) [Entry date 06/25/921

1/8/93 153 Mag/Judge Marianne B. Bowler . Order granting [119-1] Motion to clarify discovery deadlines re: admissions, denying [137-1] motion to reinstate the admissions admitted/strike untimely responses, granting in part, denying in part [120-1] motion for reconsideration of the court's denial of motion to compel, denying [140-1] motion for leave to seek discovery on court practices of Allstate and its attorneys, granting in part, denying in part [114-1] motion to compel the deposition of the plaintiff, granting [74-1],[105-1] renewed motion for disqualification, denying plaintiff's motion [213-1] to substitute, set discovery due for 3/22/93 It is RECOMMENDED that: (1) defendant's motion for Rule 11 sanctions (#129) and defendant's request for Rule 11 sanctions (#147) be DENIED and (2) that defendant's request for sanctions (#148) is DENIED without prejudice. (wam) [Entry date 01/12/93]

1/20/93 155 Notice of attorney appearance for Berta Maidanik Siguel by Paul A. Rufo (wam) [Entry date 01/21/93]

1/20/93 156 Objections by Berta Maidanik Siguel to Order and Report and Recommendations of Magistrate Bowler dated 1/8/93 FILED (wam) [Entry date 01/21/93)

7/7/93 169 Motion by Berta Maidanik Siguel to substitute Edward Siguel as plaintiff FILED c/s (wam) [Entry date 07/08/93)

10/20/93 183 Judge Robert E. Keeton . Order ISSUED. "...No other reason now appearing for not allowing Mr. Siguel to appear pro-se, he may do so. The Clerk is directed to change the caption of this case to identify Edward Siguel, and he only, as the plaintiff." (wam) [Entry date 10/25/93]

12/23/93 196 Defendant's marked version of plaintiff's proposed conclusions of law FILED (wam) [Entry date 12/28/93]

12/23/93 197 Defendant's marked version of plaintiff's proposed findings of fact FILED (wam) (Entry date 12/28/93]

12/28/93 198 Marked version of defendant's Proposed Findings of fact and conclusions of law FILED by Edward N. Siguel (wam) [Entry date 01/03/94]

1/27/94 220 Judge Robert E. Keeton . Final Judgment ENTERED. "Judgment for defendant on the contract claim against defendant. All other claims of plaintiff are dismissed in accordance with the stipulation of the parties. Costs are awarded to defendant." (wam) [Entry date 02/01/941

2/1/94 -- Case closed (wam)

3/9/94 229 Judge Robert E. Keeton . Final Order ENTERED. "For the reasons stated in the Memorandum and Order of this date, it is ORDERED: Plaintiff's motion for a new trial or reconsideration of judgment or to amend findings is DENIED." (wam) [Entry date 03/10/94].

APPENDIX L
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Edward Siguel,
Plaintiff

vs. .Civil Action No. 91-10933-K

ALLSTATE LIFE INSURANCE Co.
Defendant

PLAINTIFF'S APPEARANCE PRO SE

Plaintiff respectfully requests that the Court enter myself, Edward Siguel, to appear PRO SE. A party has a statutory right to represent himself.[1] A pro se party who is also an attorney does not violate ethical rules concerning his appearance as a witness in his own case. Those rules are not applicable to pro se litigants.[2] [3]

This decision will expedite resolution of this claim. I, the plaintiff, am not represented by counsel (see attached

---

[1] There is a statutory right of long standing to self-representation in civil claims. 28 U.S.C.A.§1654. *See Andrews* v. Bechtel Power Corp., 780 F.2d l24 (C.A.1,Mass,1985), cert. denied, 106 S.Ct. 2896, 476 U.S.1172, 90 LEd.2d 983. *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2d Cir., 1982)(the right of self-representation in civil cases is a right of high standing; a decision to deny it is immediately appealable).

[2] The disciplinary rules governing situations in which a "or is called upon to decide whether he will be witness or advocate are inapplicable to an attorney pro se litigant *Duncan v. Poythress, 77 F2d 15O8 (C.A.11, Ga, 1985), cert.* denied, 106 S.Ct. 1659, 475 U.S. 1129, 90 LE.2d 2O1. *Cf Borman v Borman, 378 Mass. 775(Supr J.Court, MA,_)* (disciplinary rules not applicable to pro se attorneys; explains why a lawyer acting pro se may be a witness).

[3] Otherwise attorneys would not be able to represent themselves in matters which involve litigation, including dayto-day dealings in life, filing insurance claims for auto accidents, complaining about or returning products, etc. Lawyers frequently argue their own traffic tickets in Court, appeal their property or income taxes and get involved in numerous situations in which they are witnesses and advocates.

my letter to attorney Rufo asking him to withdraw to resolve any ambiguity, and my affidavit filed near the date of this motion). In the interest of justice and efficiency, and to reach a prompt decision in this case, and only if this request does not interfere with my right to self-representation and to appear pro se, I request that the Court allow me to hire an attorney to assist me with this case during pretrial and trial. It is common for parties to be represented by multiple attorneys and Allstate is represented by multiple attorney. I request that all documents be sent to me.

Respectfully submitted,

/s/

MAPPEAR Edward N. Siguel, plaintiff *pro se*
14 Egmont St., #3, Brookline, MA 02146
Dated: September 2,1993 617 - 739 - 4887

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Edward Siguel,
Plaintiff

vs. .Civil Action No. 91-10933-K

ALLSTATE LIFE INSURANCE Co.
Defendant

MEMORANDUM IN SUPPORT OF PLAINTIFF'S APPEARANCE PRO SE

Brief statement of facts

I, Edward Siguel, became plaintiff as a result of a motion for substitution which was allowed by the Court. I informed attorneys for Allstate and Rufo that I intended to represent myself because it was too expensive for me to have counsel representing me all the time and because I considered it essential to present facts and law to preserve

and raise issues for appeal. I asked the Court to file, pro se, several documents to this effect, but the Court did not allow them to be filed.

Following a suggestion by attorney Rufo, I filed an appearance pro se rather than first dismissing attorney Rufo, with the understanding that attorney Rufo would assist and play a secondary role in this case. I believed that attorney Rufo could assist me to expedite the resolution of this claim.

On 8/27/93 J. Keeton, U.S.D.C., denied the request for a pro se appearance "as long as plaintiff is represented by counsel."

Because of significant differences on strategy and presentation of law and facts, and because of costs, I decided to represent myself. I would like to have the opportunity to have other attorney(s) assist me with this case in the same manner that defendant is allowed multiple attorneys. However, I will be the primary attorney and I will make the decisions. I want to act pro se and, if using another attorney interferes with my right to self representation, then I will not use another attorney. To clarity any ambiguity on this matter, I asked attorney Rufo to withdraw from this case and dismissed him as representing me, in the event that there was an implicit assumption that he was representing me.[4] Attached is a letter I sent to attorney Rufo asking him to file a withdrawal from this case.

LEGAL ARGUMENT

I am a law-school graduate. I researched the law and I am familiar with the facts (these issues were stated in previous affidavits). There are significant legal issues that need to be resolved and I believe that they have not been presented in the best interests of the plaintiff, As a result, I believe that I could lose significant legal rights. I represent that I will comply with the Fed.R.Civ.P and Court orders.

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[4] During the hearing when the Court allowed the motion to substitute, attorney Rufo requested several times that I be allowed to speak but the Court did not authorize it.

A party has a statutory right to represent himself.[5] The right of self-representation in civil cases is a right of high standing; a decision to deny it is immediately appealable.[6]

A pro se party who is also an attorney does not violate ethical rules concerning his appearance as a witness in his own case. Those rules are not applicable to pro se litigants.[7] [8]

WHEREFORE, I respectfully requests that the Court enter my appearance pro se. In addition, I request that I be allowed to retain other counsel to assist me with this case during trial. A prompt decision in this matter is requested and, if denied, I request a stay until an appeal is resolved. Denial of the right to self-representation is immediately appealable.

Respectfully submitted,

/s/

MAPPEAR Edward N. Siguel, plaintiff *pro se*
14 Egmont St., #3, Brookline, MA 02146
Dated: September 2,1993 617 - 739 - 4887

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[5] There is a statutory right of long standing to self-representation in civil claims. 28 U.S.C.A. §1654. *See Andrews* v.Bechtel Power Corp., 780 F.2d 124 (C.A.1, Mass, 1985), cert.denied, 106 S.CT. 2896, 476 U.S.1172, 90 LEd.2d 983.

[6] *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2d Cir., 1982).

[7] The disciplinary rules governing situations in which a "or is called upon to decide whether he will be witness or advocate are inapplicable to an attorney pro se litigant *Duncan v.Poythress, 77 F2d 15O8 (C.A.11, Ga, 1985), cert.* denied, 106 S.Ct.1659, 475 U.S.1129, 90 LE.2d 2O1. *Cf Borman v Borman, 378 Mass. 775(Supr J. Court, MA,_)* (disciplinary rules not applicable to pro se attorneys; explains why a lawyer acting pro se may be a witness).

[8] Otherwise attorneys would not be able to represent themselves in matters which involve litigation, including day to-day dealings in life, filing insurance claims for auto accidents, complaining about or returning products, etc. Lawyers frequently argue their own traffic tickets in Court, appeal their property or income taxes and get involved in numerous situations in which they are witnesses and advocates.